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Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1964

No. 643

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JANNEY,
Petitioners,

vs.

HELEN DOLMAN, LAWRENCE RUST LEE, JAMES KEITH MARSHALL, JR., E. P. R. DUVAL, and KATHERINE HANSBROUGH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

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Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on May 21, 1964, from which Petitions for Rehearing were denied on August 3, 1964.

OPINION BELOW

The judgment of the United States District Court for the District of Nevada appears at R. 1238.†

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 333 F. 2d 257.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered May 21, 1964, and copies thereof are appended to this petition in the appendix at pages 35-37. The Opinion appears at pages 1-33 of the appendix. Petitions for Rehearing were denied August 3, 1964 (Record, Vol. 24). The jurisdiction of this Court is invoked under 28 U.S. Code 1254 (1).

QUESTIONS PRESENTED

1. Whether a party who applies for relief from a deposition because of illness, and after the court refused to permit evidence in support of his application and refused to grant a hearing thereon, does not appear under the advice of his counsel, may have his pleadings struck and his default entered without further notice to him, and have a $1,000,000 judgment rendered against him while being refused a hearing.

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†Pages of the Transcript of Record on Appeal (Volumes 1-5) are abbreviated R. ——; pages of the Reporter's Transcript and the Exhibit Book (Volumes 6-23) are abbreviated T. ——.

2. Whether a trial court may proceed to judgment in a derivative stockholders' action while refusing to hear the defendant corporations who oppose the action. Are the corporations indispensable parties? Does setting aside their default require that the judgment be set aside?

3. Whether a default may be entered in favor of a plaintiff, at the same time striking the motions of all defendants that challenge the right of the plaintiff to be in court, and then proceed to judgment.

4. Whether attorneys may maintain an action on behalf of a client who has no standing to sue by adding the names of other parties as plaintiffs without their having knowledge of the complaint or consenting thereto.

5. Whether (1) the use of investors' money in accordance with the terms under which the funds were advanced, and (2) the use of a resulting income so as to be in accordance with War Production Board contracts, and (3) without benefit to the party charged, may form the basis of a derivative stockholders' action charging conversion of the income so used.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

U. S. Constitution, Amendment Five:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." (Constitution of the United States, Amendment Five.)

Federal Rules of Civil Procedure:

Rule 23 (b): *"Secondary Action by Shareholders.* In an action brought to enforce a secondary right on the part of one or more shareholders of an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort." (Federal Rules of Civil Procedure, Rule 23 (b).)

Rule 30 (b): *"Orders for the Protection of Parties and Deponents.* After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain

matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." (Federal Rules of Civil Procedure, Rule 30 (b).)

Rule 37 (d): *"Failure of Party to Attend or Serve Answers.* If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party." (Federal Rules of Civil Procedure, Rule 37 (d).)

Local Rule, Civil No. 7 USCD Nev.:

"Motions and Other Matters

* * *

"(b) *Notice to Be Given by Clerk:*

"Upon the filing of a motion or any other paper required to be served on the opposite party or his attorney, if oral argument shall be permitted by the court, the clerk of the court shall notice the

matter for hearing at a time at least ten days after the date of service, or at such time thereafter as may be convenient to the Court." (Local Rule, Civil No. 7 (d), USDC, Nevada.)

STATEMENT OF THE CASE

In a derivative stockholders action, Respondents sought to collect $1,000,000 from Petitioner Janney on behalf of Ely Valley Mines, Inc., and Pioche Mines Consolidated, Inc., and further sought to restrain the President of the Defendant Corporations.

Both corporations answered and counterclaimed to the complaint (R. 54), and on May 29, 1961, Petitioner Janney appeared, and answered and counterclaimed (R. 534). These answers demanded jury trial (R. 66, R. 587).

An amended complaint was filed June 6, 1961, naming four additional parties plaintiff (R. 623). This complaint did not show the required diversity of citizenship.

Petitioners moved to dismiss the Amended Complaint on this ground (R. 630).

In September, 1961, Petitioner Janney fell ill, requiring a course of treatment of some two months (T. 286, lines 9-12). Knowing of this illness (T. 284, line 23, to T. 285, line 2), Respondents' Counsel thereupon sought discovery of Petitioner Janney, noticing his deposition to take place *before* the cure could be completed (R. 688). Petitioners moved for relief

under Federal Rule 30 (b) (R. 690), asking, among other things, for a delay in the deposition until Petitioner Janney could recover from his serious illness (R. 698).

The Nevada District Court has no Motions Day, as is authorized under Federal Rule 78, which would enable a party to notice for hearing a Motion under Federal Rule 30 (b). The Local Rules (Local Rule, Civil No. 7, USDC Nev.) provide that a hearing on a motion may only be set by the Court.

Therefore, Petitioners' counsel requested the Trial Court to set their Rule 30 (b) Motion for hearing before the time noticed for the deposition (R. 689), but the Trial Court refused to do so (T. 472, T. 321, line 24, to T. 322).

However, on October 31, 1961, the motion for relief under Rule 30 (b) was brought on for hearing at the time set for a motion in another action (T. 322, lines 1-5), and was denied (R. 1402). On October 31, 1961, Respondents petitioned for the appointment of a receiver over defendant corporations (R. 726, R. 1403). The following day, the default of all petitioners was entered (R. 745), and on December 6, 1961, the motion for the appointment of a Receiver was granted (R. 1383). On March 26, 1962, the Trial Court appointed a receiver (R. 969) and on October 8, 1962, entered judgment (R. 1238).

The Court of Appeals reversed the judgment against the corporations (Opinion, p. 32), ordered the appointment of the receiver vacated (Opinion, p. 33),

and directed that the default of the corporations be set aside (Opinion, p. 32).

However, the Court of Appeals affirmed the $1,000,000 Default judgment (Opinion, p. 32, Item 2), and affirmed in part the restraining order against the corporations' President (Opinion, p. 32, Item 9).

After corporations answered and counterclaimed Respondents moved to strike the portions of the counterclaim which asserted that the complaint failed to comply with the requirements of Rule 23 (b) FRCP and was brought for vexatious purposes.

The trial court (Ross, J) denied the motion to strike, stating:

> "A study of the complaint herein reveals that the plaintiff has ignored almost all the requirements of Rule 23 (b), particularly the clause that has been underlined in the above quotation." (R. 218.)

This refers to the requirement:

> *"that the plaintiff was a shareholder at the time of the transaction of which he complains."* (R. 217.)

Immediately after the filing and service of the answer and counterclaim of the corporations, asserting non-compliance with Rule 23 (b) (R. 63), the first of a series of letters to Pioche Mines Consolidated stockholders (R. 482, lines 6-13) was circulated seeking co-plaintiffs in the action (R. 229-232).

This letter was sent on the letterhead of Respondents' attorneys (R. 228). In the series of letters to

stockholders, in which Respondents' attorneys participated with Respondent Dolman (R. 481, lines 16-23), the stockholders were assured that "no financial obligation whatsoever" would be incurred, if these stockholders authorized Dolman's attorneys to join them in the suit (R. 458, R. 466).

Thereafter, an amended complaint, adding the names of four stockholders of Pioche Mines Consolidated, Inc. who were stockholders of long standing, was filed (R. 623), together with a motion for leave to file the Amended Complaint (R. 277). It later transpired that none of these additional stockholders had engaged respondents' attorneys or even knew the suit was being brought in their names (see, for example, the affidavit of Lawrence Rust Lee filed with the Court of Appeals (Record, Vol. 24)).

The answer and counterclaims of Petitioner Janney asserted that the action against him and the corporations was brought pursuant to Respondent Dolman's written and oral threats demanding that the control of an important counterclaim of Pioche Mines Consolidated be turned over to her. It was contended by Petitioners that the four stockholders of Pioche Mines Consolidated whose names were used as co-plaintiffs had been deceived by the false representation of Dolman and her attorneys (R. 399). That the solicitations sent by Respondent Dolman and her attorneys induced responses from these stockholders is admitted at R. 482, lines 3-17, and is acknowledged in the Opinion at page 28, par. 2.

This counterclaim also asserted that the purpose of the action was to obstruct the prosecution of the counterclaim of Pioche Mines Consolidated, Inc. against Fidelity Philadelphia Trust Company (R. 583). This issue was not given a trial.

REASONS FOR GRANTING THE WRIT

The decision below allowed indispensable parties to an action to be excluded in a case that proceeded to judgment, adversely affecting the interest of the indispensable parties.

In this form, the case serves as precedent for denying a corporation that opposes a derivative stockholders' action the right to be heard.–This case thus conflicts with the decisions of other Circuits and of this Court which allow a corporation to oppose a derivative stockholders' action.

The important question of Federal law herein relates to illegally excluding evidence in disregard of the Constitutional requirements of Amendment V, that no person shall be deprived of life, liberty or property "without due process of law."

Property rights of Ely Valley Mines and Pioche Mines Consolidated in the mining property known as the Ely Valley Mine are made subject to default rulings of the Trial Court where the Circuit Court of Appeals has reversed the default order. This reversal shows to be unlawful the proceedings which excluded

both of these Corporations from cross-examining witnesses and presenting evidence.

Therefore, the decision below should be reversed because:

1. While the default of the corporations has been reversed, the damage to the corporations continues.

2. These corporations are indispensable parties to the action. Therefore a decision affecting their interest should not be rendered without their being heard.

3. A judgment claimed to be only against one defendant injuriously affects the two corporations whose default has now been ordered set aside.

INDISPENSABLE PARTIES

In a derivative stockholders' suit, *ipso facto,* the corporations are indispensable parties.[1] Recovery must accrue to the corporation.[2] The primary right sued on is that of the corporation.

Despite their answers (R. 54) and their demand for jury trial (R. 66), both corporations found all relief requested in the complaint was granted during their wrongful default.

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[1]*Meyer v. Fleming* (1946) 66 S.Ct. 382, 327 U.S. 161, 90 L.ed. 595; *Koster v. Lumbermens Mut. Cas. Co.*, 67 S.Ct. 828, 330 U.S. 518, 91 L.ed. 1067; *Price v. Gurney*, 65 S.Ct. 513, 324 U.S. 100, 89 L.ed. 776; *City of Davenport v. Dows*, 18 Wall. 626, 21 L.ed. 938; *King v. Wall and Beaver St. Corp.*, 145 F. 2d 377; *Philipbar v. Derby*, 85 F. 2d 30; *Watts v. Alexander, Morrison and Co.*, 34 F. 2d 66, aff'd 45 F. 2d 968.

[2]*Moore's Federal Practice,* Second Edition, Par. 19.13.

The corporations are "materially interested" and "injuriously affected." This also makes them indispensable parties to the action.[3]

It is well settled in the Ninth Circuit and elsewhere that indispensable parties must be heard if a Court is to enter a judgment in a case. In *Pioche Mines Consolidated, Inc. v. Fidelity Philadelphia Trust Company* (CCA 9, 1953), 202 F. 2d 944, 947, 8, the Court of Appeals for the Ninth Circuit quoted with approval from the case of *Washington v. United States* which set forth four questions that determine the matter of indispensability, saying: "If any one of the four questions is answered in the negative, then the absent party is indispensable."

The questions are:

> "(1) Is the interest of the absent party distinct and severable?
>
> "(2) In the absence of such party, can the Court render justice between the parties before it?
>
> "(3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?
>
> "(4) Will the final determination in the absence of such party, be consistent with equity and good conscience?"
>
> *Washington v. United States* (CCA 9), 87 F. 2d 421, 427, 8.

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[3] *Chicago, M., St. Paul and P. R. Co. v. Adams County* (CCA 9, 1934), 72 F. 2d 819; *Delno v. Market St. Railway Co.* (CCA 9, 1942), 124 F. 2d 965; *Young v. Powell* (CCA 5, 1950), 179 F. 2d 147.

In this case, *all four* questions must be answered in the negative:

(1) Not only is the interest of the corporations not "distinct and severable," but it is the only interest that can be asserted in a derivative stockholders' action.[4]

(2) The Court cannot render justice to the corporations if they are denied the right to be heard before judgment is entered. Yet precisely this has happened, and the damage to the corporations continues, notwithstanding the fact that their default has been set aside.

(3) The injury to the corporations in this action is summarized below.

(4) The Court cannot do equity in a case where parties directly interested in the outcome are not heard, but are injured. Rather than avoiding further litigation by doing equity between all the parties, the instant case *generates* future litigation between the parties who were not heard.

The absence of an indispensable party deprives the Court of the right to make any decree in the subject matter.[5] In order to arrest the harm *to the corporations* from a judgment in a case where they were indispensable parties but were not heard, Petitioners

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[4]*City of Davenport v. Dows*, supra; *Philipbar v. Derby*, supra.

[5]*Shields v. Barrow*, 17 How. 130, 15 L.ed. 158, 160, 161; *Chicago M. St. Paul P. R. Co. v. Adams County* (CCA 9, 1934), 72 F. 2d 816; *State of Washington v. United States* (CCA 9, 1936), 87 F. 2d 421; *Delno v. Market Street Railway Co.* (CCA 9, 1942), 124 F. 2d 965; *Hooey et al. v. Wilson*, 9 Wall. 501, 19 L.ed. 762; *California v. Southern Pacific Company* (1894), 157 U.S. 229, 251 15 S.Ct. 591, 39 L.ed. 683, 691; *Mallow v. Hinde*, 12 Wheat. 198, 6 L.ed. 599.

applied to the Court of Appeals to arrest that judgment until the corporations could be heard. This application was denied.

This action should be reviewed because the wrongful default of the corporations has resulted in damage to the corporations without their being heard, and has also resulted in the suppression of evidence that could upset the entire basis of the judgment.

INDISPENSABLE PARTIES DAMAGED BY JUDGMENT

The Judgment damages Ely Valley Mines, Inc. as follows:

(1) It holds that the assets of Ely Valley are subject to claims of Pioche Mines Consolidated, Inc.

(2) By so holding, future profits from operation of Ely Valley Mine are subject to adverse claims.

(3) Also, future financing of Ely Valley is subject to a doubt that can only be cleared by further litigation.

(4) Ely Valley was not allowed to show by its records, by Pioche Consolidated records, and by other evidence, that its ownership of the Ely Valley Mine was not subject to any valid adverse claim.

(5) Ely Valley was not allowed to show that its contract with the war production board *required* the expenditure of income to equip the mine and increase production; that this contract provided premiums for the production of metals for the war effort; and that

these premiums made up the bookkeeping profits which were used to form the basis of the judgment.

(6) Ely Valley was not allowed to show that the suit was brought in the names of persons who did not authorize it, and that to the personal knowledge of one of such "plaintiffs," the claim was false.

Pioche Consolidated is damaged:

(1) By having its counterclaim against the Trust Company discredited by the judgment.

(2) By having its principal witness on the counterclaim discredited.

(3) By not being allowed to show that it had no claim to the Ely Valley Mine nor did any of its security holders have any claim.

(4) By exposure to future litigation made necessary by the judgment.

In addition, both corporations have a substantial interest in continuing to enjoy the services of their President. Their interests are prejudiced by a judgment that deprives them of these services.

For these additional reasons, the judgment should be reviewed.

THAT THE JUDGMENT IS "IN FAVOR" OF PIOCHE CONSOLIDATED, DOES NOT CURE THE DEFECT OF NOT HEARING INDISPENSABLE PARTIES

In *Young v. Powell*, the Court said:

> "The notion contended for and made so much of by appellee in argument; . . . that, in short,

> because the judgment as finally entered was in, rather than against, the interest of those not made parties; that because, in short, they suffered no prejudice by the suit but got benefits from it, the question of their indispensability disappears; wholly disregards the compelling equitable considerations which lie behind and give rise to the indispensable party rule. If permitted to prevail, it would make of it a delusion and a snare."
>
> *Young v. Powell* (CCA 5 1950), 179 F. 2d 147.

The instant case conflicts with this Fifth Circuit decision, and with *Pioche Mines Consolidated, Inc. v. Fidelity Philadelphia Trust Co.*, supra, *Chicago, M. St. Paul P. R. Co. v. Adams County*, supra, *Davis v. Henry* (CCA 6), 266 F. 266.

FUTURE LITIGATION

Future litigation will be necessary because issues are created among the parties affected by the judgment. The purpose of the rule is to avoid such a result.[6]

In *State of California v. Southern Pacific Company*, this Court said:

> "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the

[6] *State of California v. Southern Pacific Co.* (1894), 157 U.S. 229, 39 L.ed. 683; *Delno v. Market St. Railway Co.*, 124 F. 2d 965; *Shields v. Barrow*, 17 How. 130, 15 L.ed. 158; *Hooey et al. v. Wilson*, 9 Wall. 501, 19 L.ed. 762; *Flynn v. Brooks*, 105 F. 2d 766.

> order of the court perfectly safe to those who are compelled to obey it and to prevent future litigation."
>
> *State of California v. Southern Pacific Company* (1394), 157 U.S. 229, 251, 15 S.Ct. 591, 39 L.ed. 683, 691.

In the instant case further litigation will be necessary to establish the right of the Ely Valley Mines, Inc. to the profits from its mines and the right of Pioche Mines Consolidated, Inc., to show that the claim asserted to the Ely Valley Mine is a fictitious claim.

Therefore, Petitioners ask that this Court review the judgment because it departs from the well-established law that indispensable parties must be heard.

BASIS FOR DEFAULT

The opinion below should also be reviewed because it is a radical departure from previous application of the Federal Rules.

The Opinion states that when a notice of deposition is served by the adverse party, and the deponent wishes to apply for relief under Rule 30 (b), but is unable to have the application heard before the time set in the Notice of Taking Deposition:

> "The least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard." (Opinion, page 18.)

"An order postponing the *time* of the deposition," is one of the forms of relief that is available only under Rule 30 (b)!

The question is not whether the deponent was "under no duty" to appear for his deposition (Opinion, page 18); the question raised is whether a deponent is given a *right* to apply for relief under Rule 30 (b).

If this right is given under the Federal Rules, then the Rules must be construed so as to give a deponent an effectual way to exercise that right. The District Court Rules do not allow a party to set a motion under Rule 30 (b). A request was made to the District Court to set the matter for hearing.

Thus the deponent had taken all the steps available to him to obtain a hearing on the Rule 30 (b) motion prior to the time set for the deposition. The Rules should be construed, and the procedure of the District Court so conducted, as not to prejudice him because he attempted to apply for relief under Rule 30 (b).

If this is not done, then a party who has become seriously ill, so that attending a deposition could result in his death, is placed in the position that he must follow a demand made upon him by a notice of deposition served by an opposing party without any effective remedy to protect his health.

Petitioners had a right, under the rules, to a determination of their motion. Their motion was timely filed, and they took all measures that were available to them to obtain a ruling before the time noticed in

the Deposition. Their attempts to obtain this relief were sanctioned by the Federal Rules, and the exercise of this attempt to get relief was lawful.

The construction of Local Rule 7 appearing on page 19 of the Opinion appears to conclude that the communication from the Court of Petitioners' Counsel in response to their request that the Rule 30 (b) Motion be set for hearing, was a "ruling" on the motion. The Opinion states:

> "Here, opposition was filed, Appellees' (Appellants') counsel requested a hearing, and the Court, in reply, stated that Janney was to appear." (Opinion, page 19, lines 14-16)

This was not a ruling on the 30 (b) Motion.

Neither the Court, Petitioners' Counsel, nor Respondents' Counsel considered this communication from the Judge in a letter to be a "ruling" on the motion.

No Minute Order was entered showing that the motion had been disposed of when this letter was sent; Counsel for Respondents later agreed with the Court that the matter ought to be heard (T. 333).

Additionally, if the letter of the judge was the "ruling" on the motion, then it was an abuse of discretion because the showing in the record was uncontested that the deponent's ill health precluded his giving his deposition at that time.

Petitioners attempted to obtain relief for which they had a right to apply under the Federal Rules. They did not make an appearance at the deposition

"conditional upon the Court's granting relief." There is no attempt whatever to impose any conditions upon the Court. There was an attempt to exercise a right that had statutory authority, and which was necessary to exercise because of the illness. The Opinion (page 19) suggests that the course Petitioners should have followed was to apply for relief under Rule 30 (d).

The Rules provide that both Rule 30 (b) and Rule 30 (d) are available. Since both are sanctioned, a party should not be penalized for having selected one lawful course rather than another, which might not be as effective as the one chosen at the time.

In sustaining the entry of the default against Petitioner Janney, the Court of Appeals confused the inability to submit to a deposition at that time, as an unwillingness to undergo a physical examination.

Counsel for Respondents changed his position by requesting a default instead of a warrant to compel deposition (T. 491, lines 16, 17). The Trial Court immediately granted the default (T. 491) without allowing a hearing as required by Rule 37 (d). The failure of this Notice deprived Petitioners of the testimony of Dr. Dils and Dr. Darby and others who had knowledge of the material facts.

BASIS OF JUDGMENT

The Opinion broadens the basis for damages heretofore applied to derivative actions. The Ely Valley claims were opened up and developed with new money

supplied by Petitioner Janney and others. The risks of failure were taken by these investors. When the operation showed a profit, the money was put back each month to increase the next month's profit (T. 2040 ff.; T. 2441 ff.). Without this, profits would have been nominal only. If Petitioner Janney's management of the property had produced less profit, his damages under the Opinion would be less. These results are in conflict with decisions of this Court (*Twin-Lick Oil Co. v. Marbury* (1875), 91 U.S. 587, 593, 23 L.ed. 328, 331, 2).

The Opinion states that Pioche Mines Company was the "predecessor" of Pioche Mines Consolidated, Inc. (Opinion, page 22, line 18) which was "formed to take over the assets of Pioche Mines Company," (Opinion, page 22, lines 30, 31).

These statements reflect a misapprehension of the record.

Exhibit 15 quotes in full the statement "To the Stockholders of Pioche Mines Company," dated December 21, 1928, recorded in First Meeting of Incorporators and Directors of Pioche Mines Consolidated, Inc., ca. pp. 20, 22, 23:

> ". . . the new Company will start out with a *consolidation of properties entirely independent of Pioche Mines Company . . . The old Company will remain just as it now is . . .*" (Exhibit 15, emphasis added.)

Pioche Mines Consolidated, Inc. was *not* formed to take over and did not take over any of the assets of Pioche Mines Company, but on the contrary Pioche

Mines Consolidated, Inc. acquired 6 specific pieces of property, *not one* of which was an asset of Pioche Mines Company (First Meeting of Incorporators and Directors, Plaintiffs' Exhibit 15). The two corporations owned completely separate properties until the two companies were merged in 1943 (see Merger Agreement contained in Plaintiffs' Exhibit 15).

The Opinion does not apply the rule that parties claiming an interest in real property are notified by recorded conveyances. Both the Ely Valley Trust of 1939 and the conveyance from the Trustee to Ely Valley Mines, Inc. in 1949 were recorded in Lincoln County, Nevada (Exhibit 22), thus giving notice to the world (Nevada Revised Statutes; Secs. 111.315, 111.320 and 247.190) (See also N.R.S. Secs. 11.010, 11.060-11.080 and 11.190 (Statute of Limitations); and N.R.S. Secs. 11.100-11.130 and 11.150 (Adverse possession)). Both of these documents show that the Ely Valley property was to be the basis of a corporation that was separate and distinct from either Pioche Mines Company or Pioche Mines Consolidated, Inc.[7]

Yet the Opinion (p. 22) holds that the conveyance *by the trustee* of the mine in accordance with the re-

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[7]The purpose of *authorizing* (but not requiring) the trustee to use trust assets to help *Pioche Mines Company stockholders* (Plaintiffs' Exhibit 19) was to avoid complaints by investors, should Ely Valley assets be used to defeat the action by the bondholders, which it did (see *Pioche Mines Consolidated, Inc. v. Fidelity-Philadelphia Trust Co.* (CCA 9, 1953), 202 F. 2d 944; *Pioche Mines Consolidated v. Hon. Roger T. Foley* (CCA 9, 1956), 237 F. 2d 164). This matter has not yet been presented in a trial of the merits because of the default of all defendants.

quirements of his trust was a "conversion" of the mine by Petitioner Janney!

CONCLUSION

The default of Petitioners Ely Valley Mines, Inc. and Pioche Mines Consolidated, Inc. was properly set aside, but the judgment in the case from which they were wrongfully excluded was affirmed. The restraint of their President is affirmed; the million-dollar judgment is affirmed; and the suit is declared in good faith, all without the corporations being heard on their pleadings, which contest these issues.

The corporations were deprived of the right to require proof of these contested allegations or to offer evidence against them.

They were indispensable parties to the action, but they have been deprived of the right to be heard.

Investors who successfully shoulder the risks involved in developing a mining property are penalized in accordance with the success of their venture. The measure of damages is based upon the reinvestment of income that made the enterprise a success.

A party is defaulted on a million dollar claim when his deposition is noticed to take place before he can recover from a serious illness. He is denied a hearing at which he can testify and summon others to testify as to the nature and extent of his ailment; and as to whether his following his doctors' and his attorney's advice, and his seeking timely relief under Rule 30 (b)

made his absence a wilful violation of a court order or a notice of deposition.

If his attorney's advice was wrong, $1,000,000 penalty is too severe for following bad advice.

No defendant in the action has yet had a hearing on the merits, but judgment has been entered and affirmed despite the reversal of the default of two of the three parties defendant, who were indispensable parties to the action.

For these reasons, Petitioners ask that the Judgment be reviewed.

Dated, Berkeley, California,
October 28, 1964.

Respectfully submitted,
CHARLES O. BRUCE,
Counsel for Petitioners.

MORSE AND GRAVES,
ROSCOE H. WILKES,
T. DAVID HORTON,
Of Counsel.

(Appendix Follows)

Appendix

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JANNEY, *Appellants*, vs. HELEN DOLMAN, et al., *Appellees*.	No. 17,709
JOHN JANNEY, *Appellant*, vs. HELEN DOLMAN, *Appellee*.	No. 18,192

[May 21, 1964]

Appeal from the United States District Court
for the District of Nevada

Before: HAMLEY, BROWNING and DUNIWAY,
Circuit Judges

DUNIWAY, Circuit Judge:

Before us are 10 appeals, 9 in No. 17,709 and 1 in No. 18,192, all of which have been consolidated here. To a considerable extent, they are an imposition on this Court. Appellants' opening brief is 338 printed pages long, not counting 23 pages of appendix. It bears the characteristic stigmata of a forensic effort produced under the influence of strong emotion and written in the vocative. It is an unbridled attack on appellees, their counsel, and the trial judge. It starts with an assertion, repeated ad nauseam, that the judge accepted and acted upon allegations that

he knew to be false, and goes on from there, piling up charges on nearly every page. Material under the heading: "Questions presented" begins on page 36 and continues to page 87. There are set forth some 298 "questions" supposedly raised by the appeals. Nearly all of them are loaded with assertions, innuendoes and assumptions. We cite two examples, chosen at random, that are fairly typical:

> "May a court, in granting an intervention, prejudge contested issues"?
>
> "May a court conduct proceedings in an atmosphere hostile to one side"?

How such "questions" can help us to decide this case is beyond our comprehension.

The "specifications of error on which appellants rely" begin on page 87, and continue to page 151. There are 29 numbered "specifications," but each has many subdivisions, and they total 433. Needless to say, this type of specification of error is extremely burdensome rather than helpful to this Court. Appellants' printed reply brief is of 63 pages, and is accompanied by a two volume typewritten "supplement" of 276 pages. Were it not for the fact that to do so would further prolong this already protracted litigation, we would strike these "briefs" from the files.

One of the difficulties that confronted the trial judge, and that confronts us in trying to review what he did, is that appellants and their counsel have engaged throughout, in a course of obstruction and obfuscation. Their entire efforts seem to have been devoted to resisting discovery and to resisting trial. Their conduct exemplifies the old saying: if you can't try the case, try your opponent; if you can't try your opponent, try his lawyer; if you can't try his lawyer, try the judge. Appellants claimed from the beginning that the two actions constituted an abuse of process, and in their efforts to persuade the court to accept that view they subjected the court to a veritable blizzard of motions and papers, some bearing such truly anomalous titles as "Application for relief from misuse of court process obtained by fraud." What is sometimes called the "Clerk's transcript" consists of five volumes containing 1473 pages of assorted pleadings, motions, affidavits, exhibits and miscellaneous other papers, some of which were never before the trial court.

Throughout, appellants' position has been that the litigation is totally without merit. One cannot help wondering why, if this is so, appellants did not promptly answer, press for an early trial, and get a judgment to that effect. The charges of fraud, corruption, and worse, that counsel so freely flings at appellees, their counsel, and the court, are not supported by the record.

We will endeavor, within what we hope will be reasonable limits, to extract from the record, and to decide, those questions that seem to us to be worthy of consideration. To the extent that we do not discuss the "specifications of error" they are hereby rejected; to the extent that we do not answer the "questions presented," we reject them as not requiring answers.

1. *The appeal in No. 18,192.*

In No. 18,192 there is but one appeal. That action, numbered 310 below, was begun by appellee Dolman as a stockholder of Ely Valley Mines, Inc., a Nevada corporation (Ely), and Pioche Mines Consolidated, Inc., a Nevada corporation (Pioche), and on their behalf, seeking access to the records of the corporations. The defendants are John Janney, President, and one Calhoun, Secretary, of each of the two corporations. An amended complaint was filed on February 18, 1960, accompanied by a motion for an order granting access to the records, supported by an affidavit. The court, on the same day, granted the motion by an ex parte order. Armed with the order, Dolman did obtain an examination of the records.

No further action appears until over a year later, on March 13, 1961, when Janney filed an answer and counterclaim, charging that Dolman, in bringing the action, "perpetrated a complexity of frauds upon the Court." There follows a long statement of the alleged frauds, and a counterclaim, based upon similar charges. It names as counter-defendants Dolman and her attorneys. It contains some 13 counts, which pray for various amounts of damages, ranging from $18,000 to $800,000, plus large sums of punitive damages based upon alleged obtaining of money by false pretenses (count one), obtaining property for services not performed (count two), and by fraud (count three), interference with business relationships (counts four, five), stirring up stockholders and bringing malicious lawsuits (count six), abuse by

counsel of information obtained in confidence (counts seven, eight), and libel (counts nine, ten, eleven, twelve and thirteen). This interesting document occupies pages 378 to 467 of the transcript. It was accompanied by a motion to bring in the attorneys as cross-defendants. Simultaneously, counsel filed an affidavit charging the trial judge with prejudice.

Appellee Dolman filed an answer to the counterclaim on April 14, 1961. On April 20, she noticed the taking of Janney's deposition, at Las Vegas, on May 8, 1961. On May 4, 1961, Janney moved for an "order to show cause". In the motion, he sought an injunction against appellee Dolman that would prevent her "from making or circulating any further false statements" concerning him and the corporation, and other similar relief. A dismissal of the action and an injunction against further actions were also demanded. Much of this document is a rehash of the counterclaim.

Appellant Janney claims that on May 23, 1962, the trial judge refused to hear this motion, and the appeal is from this purported refusal. The record, however, shows only a request that the court set a date to hear it. The court said it could not do it "this morning." Court and counsel then reverted to a consideration of other matters, in another case. No order was made. There is nothing from which to appeal. The appeal should be dismissed.

2. *The appeals in No. 17,709.*

In No. 17,709, there are nine appeals. The action, No. 311 in the trial court, was filed by Dolman on February 20, 1960. It is a stockholders' derivative action, brought on behalf of stockholders of Pioche and Ely against them as nominal defendants, and Janney and a number of Does. It alleges that plaintiff is a citizen of California, that the two corporations are Nevada corporations, and, on information and belief, that Janney is a resident of Virginia. In substance, it is charged that Janney is president and in control of both corporations, that they have Nevada properties worth over $2,000,000, that Janney has permitted taxes to become delinquent and refuses to pay them and has failed to pay wages of employees, and that as a result the properties may be lost. It is also charged that Janney has mis-

managed the corporations, and diverted their assets to his own use, damaging the corporations in an amount exceeding $1,000,000.

On April 4, 1960, the two corporations answered. In addition to denials, the answer alleged that Janney resided in Nevada, charged Dolman with obtaining her stock by fraud, and alleged that the action was prosecuted for purposes of harassment. It contains a counterclaim, making similar charges. It also alleged failure to comply with Rule 23(b), F.R.Civ.P.

On August 1, 1960, the corporations filed a document entitled "application for relief from misuse of court process obtained by fraud." This charges, in substance, that the action, and the prior action No. 310, were strike suits, filed following refusal of Janney to yield to certain extortionate demands by appellee Dolman. It asks for a citation, purportedly under 28 U.S.C. §401, directed to Dolman, with a view to punishing her for contempt.

On August 3, 1960, Dolman answered the counterclaim. On August 26, she filed a reply to the "application for relief." On October 17, 1960, she asked leave to file an amended complaint. On October 19, she noticed the taking of the depositions of the corporations, by taking the deposition of Janney, on October 27, at the office of Pioche, in Pioche, Nevada. The notice required that the companies produce certain records. Janney did not appear. On November 3, Dolman moved for the corporations' default by reason of Janney's failure to appear.

The case (No. 311) was consolidated with certain other pending cases by an order made November 3, 1960. These are Fidelity-Philadelphia Trust Company v. Pioche Mines Consolidated, old No. 101, now No. 1221 (the Fidelity case), action No. 310, and Dodd, et al. v. Pioche Mines Consolidated, No. 1523 (the Dodd case). This order also set aside the hearing dates of all pending matters, and set pretrial for December 8. All parties were directed to submit, within 14 days, memoranda as to all pending matters.[1]

[1]The order states that the actions are "consolidated for any and all purposes relevant to their final disposition." Its immediate purpose was the disposition of a large number of motions and other matters then pending. This was later done, on June 6, 7 and 8, 1961. Matters in each case were then taken up separately, and thereafter each case was treated separately. The order thus became a dead letter.

On November 23, 1960, appellants, by their present counsel (former counsel having sought to withdraw) filed in the "consolidated" cases and in another case, Callahan Mining Corporation v. Ely Valley Mines, Inc., Nos. 17 and 26 (the Callahan case) an application for an injunction that would prevent all other parties from filing any more papers in any of the cases.

On May 29, 1961, Janney answered. This lengthy document contains the same charges of fraud, and the same counterclaim against Dolman and her attorneys, as the answer that was filed in No. 310, in March. It is an amazing melange of evidentiary statements, arguments, quotations from prior proceedings, etc., about as far from what a pleading ought to be as can be imagined.

On June 5, 6 and 7, 1961, the court conducted hearings, at which it passed on a large number of matters then pending in the four cases. In No. 311, it denied, without prejudice, the November 28, 1960 application for injunctive relief, granted a motion for relief from the depositions noticed, quashed the notice of deposition, denied a motion to re-calendar, denied the motion for default, granted leave to file an amended complaint, denied the application for relief from misuse of court process, and postponed pre-trial.

The amended complaint was filed June 6, 1961. It adds, as plaintiffs, four other stockholders of long standing, three residents and citizens of Virginia, and one of Arkansas. On information and belief, it alleges that Janney is a resident and citizen of Virginia, thus apparently destroying diversity of citizenship. On June 19, 1961, appellants moved to dismiss on that ground. On October 31, 1961, Dolman moved in open court for leave to strike the word "Virginia" and insert the word "Nevada" in the allegation as to Janney's citizenship. This motion was granted, and the change written in by hand.[2] Janney had previously filed a sworn statement that he was a citizen of Nevada.

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[2]The "questions" that appellants raise as to this action are fairly typical of their brief.

"(a) May a Court refuse to hear a Motion to Dismiss a Complaint for failure to show required diversity of citizenship?

"(b) May a Court allow an alteration of such a Complaint in an effort to show the required diversity?

On July 3, 1961, Dolman answered Janney's counterclaim. On August 16, she noticed the taking of his deposition, at Las Vegas, on September 19. On August 30, appellants filed a motion to quash the notice, claiming harassment, and also that plaintiffs had no standing to sue, that the court lacked jurisdiction, that Dolman's counsel were disqualified, and that it was improper to take the deposition while the appellants' May 1, 1960 motion for order to show cause[3] and June 16, 1961 motion to dismiss were pending. So far as appears, no opposition was filed and no action on this motion was taken. Janney did not appear on September 19.

On October 6, 1961, Dolman filed another notice to take Janney's deposition, at Las Vegas, on October 31. On October 20, another motion to quash was filed, on substantially the same grounds, plus a claim of poor health. It was accompanied by an

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"(c) May a Court allow a material alteration of a Complaint required by the Federal Rules of Civil Procedure to be sworn without this alteration being made pursuant to the procedure prescribed by the Federal Rules of Civil Procedure and without said alteration being sworn?

"(d) May a Court allow such alteration without requiring a showing that prejudice to the Defendants would not result; without requiring a showing of excuse or reason why the unamended Complaint was false in a material respect when sworn by the Complainant; without requiring a showing of circumstances that would warrant the amendment; and without determining the issues raised by Appellants' Motion for Order to Show Cause, Motions to Quash Notices of Deposition, and Application for Relief from Misuse of Court Process Obtained by a Fraud?

"(e) May a Court proceed on such defaced Complaint which purported to be the sworn statement of the Affiant, which it was not?

"(f) May a Court proceed on such defaced Complaint to the serious prejudice of Defendants' rights?

"(g) Does such procedure deprive Defendants of due process?"

The specification of error is similar:

"(a) The alteration of the sworn Complaint in a material matter (T 353:4-9) was forgery (R 984:19-22)."

The procedure was perfectly proper. Rule 15(a) F.R.Civ.P.; *Molnar v. National Broadcasting Co.*, 9 Cir., 1956, 231 F.2d 684.

[3]No such document appears in the transcript. There is such a document, filed May 4, 1961, in No. 310.

affidavit of a Utah naturopath, stating that Janney was ill. Opposition was filed on October 27.

On October 31, a hearing was had on the motion to quash. On that day, with permission of the court, Dolman also filed a motion to strike pleadings of defendants, for default judgment, and for appointment of a receiver of the two corporations. The motion was accompanied by affidavits. The court denied the motion to quash, but ordered an inquiry into Janney's health, to take place next day at 2:00 o'clock. It further ordered that, if Janney failed to submit to examination, it would strike his pleadings and enter judgment against him. Next day, Janney did not appear; the court heard certain testimony and granted the motion to strike and for default. A formal order was filed on November 2.

Notice of appeal from the minute order of November 1 was filed November 6, 1961. We call this

Appeal No. 1.

A second "supplemental" notice of appeal, from the November 2 order, was filed on December 18. We call this

Appeal No. 2.

On November 7, the court ordered a hearing on November 15, so that judgment could be entered. The hearing began on that date. On December 4, defendants filed a motion to set aside the November 2 order. This motion was heard on December 6, and denied, and a formal order of denial was filed on December 15.

On December 6, a minute order was made, granting Dolman's petition for appointment of a receiver, and temporary restraining order. Counsel was directed to prepare a formal order. Similar directions were given to counsel on December 7. On January 4, 1962, a notice of appeal from these orders was filed. We call this

Appeal No. 3.

A formal "restraining order and order re receiver" was signed and filed January 24, 1962, but the receiver was not then appointed. On February 5, 1962, a notice of appeal from this order was filed. We call this

Appeal No. 4.

On February 6, 1962, a motion was filed for an order requiring Dolman, et al., to give security in connection with the restraining order, as required by Rule 65(c), F.R.Civ.P. On March 16, 1962, a formal order, appointing one Americo Campini receiver of the two corporations, with bond of $150,000, was signed and filed. This order also contains a restraining order similar to that of February 5. On April 6, 1962, a notice of appeal from the March 16 order was filed. We call this

Appeal No. 5.

On March 20, 1962, the receiver petitioned for instructions. This petition was granted, and the receiver instructed, on the same day. On April 6, 1962, a notice of appeal from the March 20 order was filed. We call this

Appeal No. 6.

On March 26, 1962, appellants filed a motion to remove the receiver and "for general relief." On April 9, 1962, a motion to stay the order appointing receiver was filed. On May 18, 1962, a notice of appeal from the denial of the motions of March 26 and April 9, 1962 was filed. This notice states that the motions were denied by the refusal of the court, on April 25, to hear them. We call this

Appeal No. 7.

On April 25, 1962, the receiver filed his "first report" and petition for instructions. Objections were filed by appellants on April 27. On May 8, the receiver filed a request for authority to issue receiver's certificates, and another request for instructions. Opposition was filed May 10. Opposition to the motion for authority to issue receiver's certificates was filed May 21, 1962. On May 24, the court made an order instructing the receiver. On May 31, 1962, a notice of appeal from this order was filed. We call this

Appeal No. 8.

On October 8, 1962, judgment was filed and entered. This judgment continues the receivership, restrains appellant Janney and the corporations from disposing of any of the assets or records of the corporations, restrains Janney from disposing of his stock in the corporations, and gives judgment, in favor of the receiver and against Janney, in the sum of $1,000,000, plus interest and costs of $1,299.29. It awards Dolman her expenses in prosecuting the

action, plus "compensation" for her services, and fees to her attorneys. It directs that sums collected be apportioned between and paid to Dolman, her attorneys, and the stockholders of Pioche Mines Consolidated, Inc., exclusive of Janney. It retains jurisdiction for two purposes: to change the amount of the receiver's bond, and to instruct the receiver. Findings of fact and conclusions of law were filed at the same time. A notice of appeal from this judgment was filed on October 16, 1962. We call this

Appeal No. 9.

A. *Threshold Contentions.*

Appellants make several contentions that go to the right of the District Court to proceed at all. We consider these first.

1. *Jurisdiction of the trial court.*

Jurisdiction is based upon diversity of citizenship (28 U.S.C. §1332). The allegations of the original complaint showed the necessary diversity. But when the complaint was amended by adding new plaintiffs, some of them citizens of Virginia, diversity no longer appeared, it being also alleged that defendant Janney was a citizen of Virginia. This difficulty was eliminated by the amendment which the court permitted on October 31, 1961. Janney can hardly complain—he had alleged in his answer, filed on May 29, 1961, that he was a citizen of Nevada. The plaintiff, and the court, took him at his word. Under 28 U.S.C. §1653, a complaint may, with the permission of the court, be amended to show jurisdictional facts. *Molnar v. National Broadcasting Co.*, 9 Cir., 1956, 231 F.2d 684. The trial court had jurisdiction.

2. *Claimed failure to comply with Rule 23(b), F.R.Civ.P.*

The original complaint is certainly deficient in this respect. It does not allege that Dolman was a shareholder at the time of the transactions of which she complains, (Rule 23(b)(1)) or that the action is not collusive (Rule 23(b)(2)), and does not set forth with particularity the efforts made to secure the desired action from the trustees or directors or shareholders. It does allege, however, that Janney has for many years controlled the operation of the corporations, has purported to act through a board of directors, but in fact, has individually managed, directed and

controlled all of their activities, that he has left Nevada, and that the properties, assets and business of the corporations have been abandoned by the management and directors and by Janney. The complaint was accompanied by a motion for an order requiring payment of taxes on certain of the corporations' properties, together with an affidavit stating that but one stockholders' meeting of Ely, (and none of Pioche), has been held for many years, that demand that such meetings be held has been ignored, that Janney has denied plaintiff Dolman access to the books, that he has filed incorrect lists of directors with the Nevada Secretary of State, and various other matters.

The amended complaint adds four plaintiffs, each of whom is alleged to have been a stockholder of the corporations at all times mentioned in the complaint. Dolman acquired her shares on November 23, 1955. It also contains the required allegation that the action is not collusive.

We have recently held that the requirements of Rule 23(a) F.R.Civ.P. are not jurisdictional. *Harris v. Palm Springs Alpine Estates, Inc.*, 9 Cir., 1964, ... F.2d ..... (No. 18578, decided March 26, 1964). The reasoning applies equally to Rule 23(b). Jurisdiction is conferred by act of Congress. The Rules do not purport to diminish that jurisdiction. The purpose of Rule 23(b) is to protect the courts from collusive actions, and to protect corporations and their officers and directors from strike suits. It deals with procedure and relief, not jurisdiction.

We think that the complaint, the affidavit,[4] and the amended complaint show sufficient compliance with the Rule to the extent that the court had authority to proceed to the merits. At the least, the allegations show that demand upon the directors or stockholders would be futile. *Cathedral Estates, Inc. v. Taft Realty Corp.*, 2 Cir., 1955, 228 F.2d 85, 88; 3 Moore, Federal Practice, §23.19, p. 3525.

3. *Claimed disqualification of appellees' counsel.*

In appellants' "application for relief from misuse of court process obtained by fraud," in the answer and counterclaim filed

[4]As to the propriety of considering the affidavit, see *Lucking v. Delano*, 6 Cir., 1942, 129 F.2d 283.

by appellant Janney, in appellants' August 30, 1961 motion to quash notice of taking deposition, in their similar motion of October 20, 1961, in their March 26, 1962 motion to remove receiver and for other relief, and in their April 27, 1962 objections to the receiver's account, appellants asserted that appellees' counsel were disqualified by reason of their having been employed by appellants Janney and Pioche to represent Pioche in the Fidelity case. However, there is no paper in the file in action No. 311 in which appellants directly sought, in advance of trial, to have the court enjoin the attorneys from representing appellees, or to stay all proceedings by reason of the alleged disqualification, or to dismiss the action on that ground. Perhaps, by stretching language, the "application for relief from misuse of court process" can be construed as requesting some such relief. It was denied. Conflicting affidavits were filed. The court was not bound to believe those of appellants, and obviously did not.

The record indicates that present counsel for appellees were brought into the Fidelity matter (see *Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co.*, 9 Cir., 1953, 202 F.2d 944; *Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co.*, 9 Cir., 1953, 206 F.2d 336; *Pioche Mines Consol. v. Foley*, 9 Cir., 1956, 237 F.2d 164) by appellant Janney and appellee Dolman, who were then friendly and working together. At that time there was pending only a counterclaim by Pioche against the trust company. After some consultation, an amended counterclaim was filed, signed by those counsel and others. Thereafter, counsel and Janney disagreed about compensation, and counsel ceased to represent the counterclaimant. The papers in the record contain assertions that, in the course of conferences in reference to the Fidelity case, these counsel obtained confidential information useful to them in actions Nos. 310 and 311. This is denied by counsel. We might feel that, if we were counsel, we would not have participated in the present litigation, lest there be some such contention made, however baseless it might be. We cannot, however, say that the record made by appellants requires the conclusion, as a matter of law, that counsel should be forbidden to participate. We have examined the counterclaim in the Fidelity case, which is in the transcript, and we find that the issues there are quite different from the issues here. The information needed to enable coun-

sel to draw that counterclaim would not necessarily be useful to counsel in prosecuting actions Nos. 310 and 311 here involved. The same can be said of another action, the Callahan case, in which it is claimed that these counsel at one time represented Ely. We cannot say, assuming the point to have been properly raised, that the court erred in permitting counsel to proceed.

B. *The entry of default.*

One of the appellants' principal contentions is that the court erred in entering their default. Appeals Nos. 1, 2 and 9 relate to this default. It is more than doubtful whether the November 1 and 2 minute order and formal order are appealable, a question that we need not consider, since the propriety of these orders can obviously be considered in the appeal from the judgment (No. 9). The default was entered pursuant to Rule 37(d), F.R.Civ.P., for Janney's contumacious refusal to appear and testify at a properly noticed deposition.

It will be recalled that notices of intent to take his deposition were served on October 19, 1960, (as president of each of the two corporations), on August 16, 1961 (capacity not specified—by then he had appeared, answered and counterclaimed), and on October 6, 1961. As to each of the two latter notices, a motion to quash was filed. In June, 1961, the court quashed the first notice without opposition by appellees, because the court wanted a fresh start. For the same reason, and at the same time, it denied appellees' motion to enter the default of the corporations. That motion was based upon Janney's failure to appear in response to the first notice, but was not pressed. The motion to quash the second notice was not acted upon, and again Janney did not appear. When the motion to quash the third notice was filed, counsel for appellants wrote to the judge, calling attention to the fact that the deposition was noticed to be taken at the courthouse, and suggesting that the motion to quash be heard at the time for which the deposition was noticed. The judge replied that he would expect Janney to appear, but Janney did not appear, although his counsel had told him about the notice and about the judge's letter.

In response to an inquiry, counsel stated that Janney was "not available" and would not be there, on the ground that he was

advised by counsel that he need not appear because the motion to quash was on file. Rule 30(b), F.R.Civ.P. was cited. Appellees' counsel then asked leave to file a motion for default judgment.

The court allowed the filing, declined to consider that motion or the motion to quash at that time, but did begin an inquiry as to why Janney did not appear. Appellees' counsel suggested the issuance of a bench warrant, and the court then decided to consider the motion to quash as well. It treated the prior motion to quash as also before it, most of the grounds urged in both motions being similar. Insofar as the motions were based on the three grounds discussed in this opinion under the heading "Threshold Contentions," the court denied them. This was not error.

The court then considered the claim that Janney's health would not permit his appearance. The court inquired of Janney's two counsel as to Janney's whereabouts. Each replied: "I am not sure." The court indicated that poor health was the only possible meritorious ground for not requiring Janney to depose forthwith. It obviously, and properly, was in doubt as to whether the claimed disability was genuine. Counsel for Janney conceded that his physical condition would not prevent his coming to Las Vegas to be examined. The court therefore ordered that Janney appear at 2:00 o'clock the next day for a physical examination, at appellees' expense, by two doctors to be selected from lists to be submitted by each side. The order provided that if either side should not submit a list, it was to be deemed to have waived its right to do so, and to be satisfied with the doctors submitted by the other side. The court indicated that if Janney did not submit to the examination, it would grant appellees' motion for his default. Janney's counsel did not designate any doctors, and the court chose two designated by appellees. The court then signed a written order.

The next day the following colloquy occurred:

"COURT: How are we getting along with Mr. Janney's deposition?

MR. HORTON: [of counsel for Janney] We are not.

COURT: Is he going to come here today?

MR. HORTON: No, Your Honor.

COURT: He is not coming?
MR. HORTON: No."

• • • •

"COURT: I would like to find out what Mr. Janney is going to do about these depositions. You better get him over here at two—you still have time.
MR. HORTON: If Your Honor please, if I might tell you what I can tell you about this at this particular time—last night I called Mr. Calhoun, [secretary of Pioche] in Pioche and he advised me that he took Mr. Janney to Caliente on Tuesday—that would be a week ago yesterday, to see Dr. Dills who recommended that Mr. Janney go away somewhere and take a rest where he would not be disturbed . . . ."

• • • •

"MR. WILKES: [of counsel for Janney] Mr. Calhoun's message was to me that Mr. Janney was advised by his doctor to seclude himself for a period of rest; that he was in bad condition. So far as I know, Your Honor, none of us know where he is actually at the present time."

Horton did not correct this statement.

"COURT: I see—anything else?
MR. HORTON: I talked to Dr. Dills who confirmed he had told Mr. Janney that he ought to get away where he could be relieved from tension. This was also last night.
COURT: Who is Dr. Dills?
MR. HORTON: He is a physician in Caliente, Nevada, Your Honor, and from one of the two of them, there was some mention made of a week or ten days—I don't recall."

After further questioning of counsel, and discussion of the possibility of issuing a bench warrant, the court recessed until 2:30 o'clock to reconsider the matter.

When the court reconvened appellees' counsel suggested that one of Janney's counsel, Horton, be required to take the stand. He testified:

"Q Mr. Horton, would you tell us, please, when the last time was you talked to Mr. Janney?
A I talked to Mr. Janney last night on the telephone.

Q Where was he at that time?
A The call was placed to the residence of a man named Williams in Houston, Texas."

• • • •

"COURT: Where was that, from where?
A At the residence of a man named Williams in Houston, Texas."

• • • •

"Q When you spoke to Mr. Janney last night, did he indicate any intention of returning for the purpose of taking the deposition, having the deposition taken in Civil Action 311?
A He indicated an intention of returning; it was not a question of his returning for the appearance today.
Q Did he indicate that he would submit himself to the taking of the deposition in Civil 311?
A I did not ask him directly that question.
Q Has he ever indicated an intention of submitting himself for the taking of his deposition in action 311?
A Under proper circumstances, he has.
Q Well, will you tell us what those circumstances are that Mr. Janney has indicated he will submit himself for the taking of his deposition in Civil Action 311?
A Insofar as the matter was discussed with him and the particular circumstances enumerated, these would include the granting of appropriate relief under Rule 30(b)."

• • • •

"A His communication to me, as I recollect it, with regard to submitting to an examination had to do with the appropriateness of relief under Rule 30, that would include staying of the deposition, that would include an order that the deposition be taken in Pioche, rather than in Las Vegas; that would include the granting of relief that we have asked this Court to give us pursuant to the timely motion, that would expose the present plaintiffs as abusing the processes of the Court—for the purpose of backing up extortionate demands and for the disqualification of the attorneys that had served the notice on the ground of prior retainer. Those are what I recall of the grounds that are involved under Rule 30(b)."

• • • •

"Q All right. Last night did you tell Mr. Janney he was ordered by the Court to appear here today for physical examination by the doctors in Las Vegas?"

• • • •

"A Yes.
Q Did he indicate he would so appear or that he would attempt to appear?
A He indicated that he could not appear.
Q That he could not?
A That is right.
Q Why could he not appear?
A Lack of adequate notice and——
Q Well, he was physically able to travel to Texas, apparently, is that correct?
A He was not able to come on a half-day's notice from Houston, Texas, to Las Vegas, Nevada.
Q Did he make any attempt to obey the Court's Order to appear here today?
A You would have to ask him.
Q I am asking you if you know if he made any attempts to appear here.
A Yes.
Q As far as you know, Mr. Horton, did Mr. Janney make any attempt to come here in response to the Court's Order of yesterday.
A Not as far as I know.
Q Is he enroute here now, so far as you know?
A Not so far as I know.
Q Is he planning on staying in Houston, Texas, so far as you know?
A I am not certain of his plans.
Q Didn't he tell you what his plans were when you talked to him?
A He indicated he would return here in a week.
Q Pardon?
A He indicated that he would return in a week.
Q Return to Las Vegas or Pioche?
A Return to Nevada.
Q Did he indicate whether he would return to Pioche or to Las Vegas?

A I understood him to mean that he would return to Pioche.

Q When you talked to Mr. Janney last night on the telephone did he appear rational?

A Yes.

Q Coherent, logical, in command of his faculties?

A He appeared to me to be, yes."

Following the close of testimony, the following colloquy between court and counsel occurred:

"COURT: Let me ask you this—let me ask you this, if I defer acting on this until tomorrow morning or tomorrow afternoon, will you have Mr. Janney here tomorrow morning, here at ten o'clock?

MR. HORTON: I don't know, Your Honor."

• • • •

"MR. HORTON: He says the abstention of tension or——

COURT: Would hurt him—I don't think you would produce him here if I gave you an oportunity to produce him. You wouldn't do it.

MR. HORTON: Under the circumstances of this case, I wouldn't recommend to him that he come."

After further argument, the court ordered Janney's pleadings stricken, and his default entered.

Neither in his written motion to set aside the default, nor in the oral presentation of it, did Janney or his counsel offer his appearance for a deposition if the default were set aside. So far as this record shows, he is still unwilling to depose. Counsel's position has continuously been that he was under no duty to do so.

Counsel's view seems to be that a party need not appear if a motion under Rule 30(b), F.R.Civ.P. is on file, even though it has not been acted upon. Any such rule would be an intolerable clog upon the discovery process. Rule 30(b) places the burden on the proposed deponent to get an order, not just to make a motion. And if there is not time to have his motion heard, the least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard. He

might also appear and seek to adjourn the deposition until an order can be obtained. (Rule 30(d)). But unless he has obtained a court order that postpones or dispenses with his duty to appear, that duty remains. Otherwise, as this case shows, a proposed deponent, by merely filing motions under Rule 30(b), could evade giving his deposition indefinitely. Under the Rules, it is for the court, not the deponent or his counsel, to relieve him of the duty to appear.

Nor did the peculiar rule of the local court, relating to motions, excuse him. That rule (Rule 7), indicates that ordinarily an oral hearing on a motion will not be held, but the motion will be decided upon the papers on file. It further provides that if opposition to the motion is not filed, this is deemed a consent to the granting of the motion. Here, opposition was filed, appellees' counsel requested a hearing, and the court, in reply, stated that Janney was to appear.

It is clear that the failure to appear was willful. It was not merely intentional; it was a direct flaunting of the authority of the court. It was conditional upon the court's granting relief that it had discretion to deny. No court is required to tolerate such deliberate defiance of its authority.

We are aware that the fifth amendment to the Constitution sets limits upon the authority conferred upon the court by Rule 37(d). See *Societe Internationale v. Rogers*, 1958, 357 U.S. 197, 208-10. But we can find no deprivation of due process here. The court kept the door open until it became very clear that Janney would depose only upon his own terms, regardless of what the court's terms might be. Rule 37(d) advised him of the consequences. The court did not abuse its discretion, either in ordering the default of Janney or in refusing to set it aside. (See *Collins v. Wayland*, 9 Cir., 1944, 139 F.2d 677)

We have thought it appropriate to burden this already lengthy opinion with quotation from the record because we think it well illustrates the pattern of evasion and obstruction, indeed open defiance, with which appellant Janney and his counsel met every effort of appellees and the trial court to secure his deposition. We endorse the sentiments of the many courts which have viewed the disposition of important interests by default judgment as an

unsatisfactory substitute for a full hearing on the merits (*e.g., Gill v. Stolow*, 2 Cir., 1957, 240 F.2d 669). We agree that a party should be deprived of his day in court only upon a strong showing of willful disobedience of court process. In this case, however, the portion of the record quoted above is but one sample of persistent conduct by appellant Janney which the trial court found to be willful. We think that finding not only well supported, but virtually inescapable.

The court did err, however, in ordering the default of the corporations. Appellees' counsel expressly stated that their motion was directed solely to the striking of Janney's pleadings and the entry of his default, and that he was not asking for such relief against the corporations. Nevertheless, the order that counsel prepared, and that the court signed, orders that the defendants' pleadings be stricken, and their default entered. The judgment is to the same effect. We think that, while Rule 37(d) gave the court authority to enter the default, it should not have done so, as to the corporations, when such relief was not sought. The rule itself provides for a motion and notice, and counsel made it clear, when the motion was heard, that his motion was not aimed at the corporations.

When this discrepancy between the motion and the resulting order was called to the court's attention, it declined to change it, apparently accepting the representation of appellees' counsel that default of the corporations was technical only, since they were nominal defendants against which no relief was sought. This view, however, failed to take account of the motion to appoint a receiver over the corporations, moreover, in striking the pleadings of the corporations, the trial court struck counterclaims by which the corporations had asserted claims for relief against plaintiff Dolman. We consider at a later point the significance of this error.

C. *The money judgment against Janney.*

Beginning on November 15, 1961 and continuing until December 15, 1961, the court took testimony, pursuant to Rule 55(b)(2), F.R.Civ.P. to determine the amount of damages to be awarded against Janney. This was based upon the second "cause of action" stated in the amended complaint which charged that

he had diverted corporate assets to his own use, to an extent that "exceeds the sum of $1,000,000." While this is a rather sketchy pleading, we think it sufficient, under Rule 8(a) and (e), F.R.Civ.P., to permit the court to proceed. No motion for a more definite statement (Rule 12(e)) was made.

On this issue, the findings are as follows:

"One of the principal assets of defendant Pioche Mines Consolidated, Inc. was that certain mine commonly known as the Ely Valley Mine located at Pioche, Nevada. Said corporation expended substantial amounts of money upon said mine.

"On numerous occasions defendant John Janney reported, in writing, to stockholders of said corporation and to investors in said corporations, that said mine was an asset of said corporation.

"While purporting to hold said Ely Valley Mine in trust for the benefit of the stockholders of Pioche Mines Consolidated, Inc., the said John Janney wrongfully converted the said mine for his own uses and purposes to the detriment of the stockholders of said corporation.

"As a result of said wrongful conversion of said Ely Valley Mine, net profits from the operation of said mine in excess of the sum of One Million Dollars ($1,000,000.00) were wrongfully used by the said John Janney, for his own purposes, which were not for the benefit of defendant Pioche Mines Consolidated, Inc., nor the stockholders thereof.

"Innocent third parties have subsequently acquired interests in the said Ely Valley Mine which prevent the return of said mine to defendant corporation Pioche Mines Consolidated, Inc.

"At all times involved herein, defendant John Janney wrongfully concealed, without cause, the true facts concerning his wrongful misappropriation of the said Ely Valley Mine from the stockholders of defendant corporation Pioche Mines Consolidated, Inc., and purported to hold the said mine for the benefit of the stockholders of said corporation. At no time prior to the commencement of this action did the said John Janney repudiate his claim that his holding

of Ely Valley Mine was for the benefit of the stockholders of Pioche Mines Consolidated, Inc. At no time prior to the commencement of this action did any of the stockholders of said corporation know, nor are they chargeable with constructive knowledge thereof, of the wrongful conversion by the said John Janney of the said mine, and the proceeds thereof.

"By reason of the foregoing, the stockholders of Pioche Mines Consolidated, Inc., exclusive of stockholder John Janney, have been damaged by the said John Janney in an amount in excess of One Million Dollars ($1,000,000.00)."

The time of the conversion is stated by appellees to be 1949, and the act of conversion the transfer of the mine to appellant Ely.

Appellants strenuously argue that the evidence does not support the findings. Their principal contention is that the Ely Valley Mine has always been the property of Janney, and never belonged to Pioche or its predecessor, Pioche Mines Company, and that therefore it could not have been an asset of Pioche, or, as such, converted by Janney.

The evidence that is claimed by appellees to support the findings is largely documentary, coming principally from the records of Pioche and Pioche Mines. It is not disputed that legal title to the mine was in Janney until 1939, when it was placed in the so-called "Ford trust." But there are a number of papers in the record in which it is asserted, by Pioche Mines Company or Janney, that the mine was an asset of that company. This was promotional material for the corporation, and Janney was president, a stockholder, and a principal promoter. It was also shown that, when Pioche was formed to take over the assets of Pioche Mines Company, and certain others, the literature sent to stockholders, who had thereto- re been told that the mine was an asset of Pioche Mines Company, did not tell them that it was *not* to be an asset of Pioche, thus leading to the inference that it would be.

Accounting records of Pioche were introduced, showing considerable expenditures by it on the mine. There is also material,

issued after the incorporation of Pioche, indicating that the mine was one of its assets. We think that the court could infer, as it did, that the beneficial ownership was in Pioche, even though, because of the informal manner in which the business was conducted by Janney, dry legal title remained in Janney. If the promoter of a corporation who holds title to an asset represents to the public at large, including the stockholders, that the asset belongs to the corporation, we think that the court can take him at his word. Janney attempted to explain this evidence away, but the court was not bound to, and did not, accept the explanation.

In 1939, Janney conveyed the mine, in trust, to one Ford. The conveyance was expressly for the benefit of the stockholders of Pioche, and bears the earmarks of a fraudulent conveyance designed to insulate the mine from the claims of parties engaged in litigation with Pioche, while permitting the use of the mine to obtain funds to fight the litigation. Janney explains it as an attempt by him personally to provide funds by the use of an asset of his own, for the same purpose. Again, the court was not required to believe him.

In 1949, the trust was terminated and the mine conveyed to Ely. This is the conversion relied upon. It will be noted, however, that the judgment is not based upon a finding as to the value of the mine. The finding is that net profits from operating the mine were not paid over to Pioche. It is urged that this finding is not supported. The finding is based on a statement, issued by Janney as president of Ely, showing moneys received and paid out to December 31, 1950. This does show "net from operations" of $1,049,728.86. The statement shows where the money went, and none of it went to Pioche, except a loan of $56,162.72. The latter would have no significance if the moneys loaned were in fact Pioche's money. The moneys were used for mine development, buildings, machinery and equipment, and to purchase interests in other properties. But none of these went to Pioche either. The judgment, insofar as it relates to Pioche, is supported.

However, no attempt was made to show any damage whatever to Ely, and none is found by the court.

D. ***The Receivership.***

We have concluded that it was error to appoint a receiver for the two appellant corporations, for several reasons.[5]

First, the prayer of the complaint is insufficient to permit the appointment on a default. The prayer, so far as material, is as follows:

> "4. That said corporations, and each of them, and the said JOHN JANNEY, be restrained from exercising any control or entering into any transaction with regard to the said corporations, until further order of this Court."

We think that a receivership is so different from an injunction that this can hardly be held to give notice to appellees that a receivership would be sought. (See ***Pueblo Trading Co. v. El Camino Irr. Dist.***, 9 Cir., 1948, 169 F.2d 312)

Second, as we have already held, it was error to enter the default of the two corporations. The default of Janney alone would not justify a default receivership of the corporations. His sold interest in that question would be in his capacities as president of and as a stockholder in each. The corporations were entitled to contest the application, and this right was not accorded to them. Not every receivership is beneficial to a corporation. There is always expense involved. Sometimes a receivership results in insolvency. Thus they were prejudiced by the entry of their defaults.

Third, we do not think that a receivership would be proper in this case in any event. Receivership is an ancillary remedy, and the substantive relief here sought does not justify its use. The only claims for substantive relief stated in the amended complaint are two. One is that the court should see that certain taxes be paid upon undesignated real properties. This has been done,

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[5]Appeals Nos. 3, 4, 5 and 7 relate to the appointment of the receiver. Nos. 3 and 4 appear to be premature. They also relate to orders that were clearly interlocutory. No. 5 relates to the actual appointment, and No. 7 to denial of motions to remove the receiver and to stay the order appointing. No. 9, the appeal from the judgment, also relates to the receivership, which is ordered continued in effect. These appeals, except Nos. 3 and 4, are properly before us under either section 1292(2) or section 1291, 28 U.S.C.

and the matter is moot. The other is for $1,000,000, on behalf of the corporations and against Janney. This has been awarded, as to Pioche. The only ancillary relief asked is the injunction referred to in the portion of the prayer quoted above. A receivership is not an end in itself; it is but a means to an end. Here no end was sought. Under the judgment, none is in sight.

There is a charge that Janney controls the corporations and their boards of directors, and has abandoned them and their properties, and that he has profited at their expense. But for all that appears, upon termination of his control by an injunction, or even without it, the stockholders would be able to meet, elect new boards of directors, and conduct the affairs of the corporations as they deem best. Nothing in the complaint indicates that they would not. In this respect, the motion for the appointment of a receiver, filed as a part of the motion for default judgment, adds little. It indicates that plaintiff Dolman has obtained a list of stockholders, has ascertained the addresses of many of them, and holds their proxies. For all that appears, they can control the corporations.

Both are Nevada corporations, and the law of Nevada provides ample means for rectifying the situation portrayed by the complaint and the affidavits. (See *e.g.*, Nevada Revised Statutes, §§78.335; 78.345; 78.600; 78.630; 78.635-45; 78.650-78.715) Appellees did not at any time claim to base their complaint upon any of these statutes. We need not decide whether, in a diversity case, a federal court could take jurisdiction of an action grounded upon any of these statutes. We presume that it could. This is not such an action.

Nor need we decide whether, in dealing with a request for a receivership in a diversity case, the court must apply state or federal law. If the applicable law be federal, on the theory that the relief is "ancillary," and the matter is "procedural," granting the relief here would be improper. *Gordon v. Washington*, 1935, 295 U.S. 30. It seems probable, however, that the applicable law is that of Nevada. See: *Guaranty Trust Co. v. York*, 1945, 326 U.S. 99; *Kohler v. McLellan*, 5 Cir., 1946, 156 F.2d 908; *Mintzer v. Arthur L. Wright & Co.*, 3 Cir., 1959, 263 F.2d 823; Moore, Federal Practice, §§2.09, 66.05; Note, 67 Harv.L.Rev. 836 (1954);

but see 1 Clark, Receivers §144(c), p. 232, (3d ed. 1959); compare *Byrd v. Blue Ridge Elec. Corp.*, 1956, 356 U.S. 525.

If Nevada law be applied, the result is the same, because appellees have not brought themselves within the terms of the applicable Nevada statutes, particularly Nev. Rev. Stat. §§78.650-78.715. That they would be required to do so is indicated by *Cohen v. Beneficial Loan Corp.*, 1949, 337 U.S. 541. See, also, *Shelton v. Second Judicial Dist. Court*, 1947, 64 Nev. 487, 185 P.2d 320, and compare *International Life Underwriters v. Second Judicial Dist. Court*, 1941, 61 Nev. 42, 113 P.2d 616.

The orders appointing the receiver, and the portion of the judgment that continues the appointment, must be reversed. The receiver must be required to account and to deliver the properties of the respective corporations to them, and be then discharged. (See *Brictson Mfg. Co. v. Close*, 8 Cir., 1922, 280 Fed. 297, 301)

E. *The Injunction.*

The court, by minute order of December 6, 1961, ordered the issuance of a temporary restraining order. This was embodied in a formal order on January 24, 1962. The order provides:

> "IT IS HEREBY ORDERED that the abovementioned defendants, and each of them, are hereby restrained from disposing of any and all assets, including moneys, of the abovementioned defendant corporations until further order of this Court;"

The court did not require a bond as provided in Rule 65(c) F.R. Civ.P. The order appointing the receiver, of March 16, 1962, also contains an injunctive provision as follows.

> "IT IS FURTHER ORDERED that said defendant corporations, their officers, managers and agents, are restrained from disposing of, transferring or removing any of their assets, properties, books, files, records and accounts, and they and each of them and all other parties having property in their possession or under their control belonging to said corporations are hereby directed to deliver the same to said receiver."

It requires a receiver's bond of $150,000. The first order fails utterly to comply with Rule 65(d); the second complies. The bond, however, is not the customary form of bond issued when an injunction is obtained (Rule 65(c)).

The judgment contains the following injunctive provisions:

> "Said defendant corporations, their officers, managers and agents, are restrained from disposing of, transferring, or removing any of the assets, properties, books, files, records and accounts of said corporations, and they and each of them and all other parties having property in their possession or under their control belonging to the said corporations are hereby directed to deliver the same to said Receiver.
>
> "Defendant John Janney is hereby restrained from disposing of or otherwise hypothecating his stock in the following corporations: Pioche Mines Consolidated, Inc., Ely Valley Mines, Inc., Pioche Power & Light Company."

Appeals Nos. 4, 5, 7 and 9 relate to these matters.

The order of January 24, 1962 must be reversed for failure to comply with Rule 65(d). The order of March 16, 1962 must be reversed because it is in aid of the receivership, as to which it is also being reversed.

The judgment, insofar as it enjoins anyone other than Janney, must also be reversed, because of the error in entering the default of the corporations. As it relates to Janney, it must be reversed insofar as it enjoins him from disposing of his stocks. There is no finding that these stocks were wrongfully acquired by him, or that any person other than Janney has any interest in them. See *Monte Rico Min. & Mill. Co. v. Fleming*, 8 Cir., 1919, 258 Fed. 106: "The right of a stockholder to sell and transfer his stock is one of the commonest incidents." (at 108)

Insofar as the judgment enjoins Janney from disposing of any of the corporate assets, it should be affirmed. There are findings that he has wrongfully done so, as to Pioche, and findings that he has failed in many of his obligations as an officer and director of both corporations. See *Monte Rico Min. & Mill. Co. v. Fleming*, *supra*.

F. The Expenses of Suit.

The judgment awards appellee Dolman $46,457.90 as expenses incurred or paid by her in prosecuting the action and $75,000.00 as compensation for her services. It also awards her counsel a total of $215,000.00. All of these sums are to be paid out of the $1,000,000.00 that Pioche is to recover from Janney.

No moneys have been recovered on behalf of Ely. The recovery on behalf of Pioche is for wrongs occurring long before Dolman became a stockholder on November 23, 1955. Thus, under Rule 23(b), F.R.Civ.P., Dolman had no standing to prosecute the action in relation to those wrongs. It was only because she and her counsel brought in other stockholders who were such at the time of the wrongs that the court could proceed to judgment against Janney. The record also shows that the other stockholders were brought in by Dolman and her counsel upon the express representation and understanding that there would be no expense to them.

While we have been cited to no authority on the question, and have found none, we think that to allow these portions of the judgment to stand would encourage a too easy avoidance of Rule 23(b). Our holding in this case that the court could properly proceed after the additional stockholders were brought in goes far enough. It does not follow that the single stockholder who instituted the action, but did not have standing to complain of the wrongs on which the judgment is based, should recover her expenses, including her attorneys' fees, much less that she should be paid for her efforts.[6] We think that her time and expense should be charged to her. Both she and her counsel knew when she acquired her stock, and the matter of her standing to bring the action was raised in the corporations' answer as early as April 4, 1960. Apparently, counsel either failed to read Rule 23(b) or elected to disregard it when they drew the complaint.

The award of counsel fees stands on a somewhat different footing. (See Hornstein, The Counsel Fee in Stockholders' Derivative Suits, 39 Colum. L. Rev 784, 811-12) As is there pointed

[6]We do not decide whether it is ever proper to award compensation, as distinguished from expenses, to one who successfully prosecutes a stockholders' derivative suit.

out, the corporation benefits from counsels' efforts, and often the stockholder plaintiffs do no more than lend their names. This may not be true of Dolman, but it is true of the other plaintiffs, who joined in the amended complaint.

We think that counsel are no more entitled to compensation for that part of their efforts that occurred when Dolman was their sole client than is Dolman herself. We also think, however, that the court can allow them compensation for that part of their efforts in obtaining the $1,000,000.00 judgment that occurred after the amended complaint was filed on June 6, 1961. At that point, as we have held, Rule 23(b) was complied with.

The court has already determined that the value of the services rendered by counsel, from May of 1958 to the date of judgment (October 8, 1962) is a total of $200,000 for one firm and $18,529.19 for local counsel. We do not disturb this finding. But we hold that only a portion of these sums should be paid out of the funds recovered for Pioche, namely, the portion that represents the value of services rendered on and after June 6, 1961. As to services rendered before that date, counsel must look to their client for payment.

We think it proper that judgment run in their favor. (See *Hutchinson Box Board & Paper Co. v. Van Horn*, 8 Cir., 1924, 299 F.2d 424, 426; *Angoff v. Goldfine*, 1 Cir., 1959, 270 F.2d 185.) Perhaps, in theory, the judgment for counsel fees should be in favor of their clients, who employed them. But in a very practical sense, counsel acted for the corporation, and therefore they should be paid direct, out of what they recover. They should not, however, be paid in full before any money goes to the corporation. Until collected, the judgment is but a paper, and counsel and the corporation should share, ratably, such sums as are in fact collected. The portions of the judgment awarding moneys for expenses, compensation, and attorneys' fees must be reversed in part and remanded.

G. *The Form of the Judgment.*

The judgment awards the receiver $1,000,000.00 against Janney, "for the benefit of Pioche Mines Consolidated, Inc. stockholders," exclusive of Janney. It further directs that moneys collected be

paid direct to the stockholders of Pioche, exclusive of Janney and of any other stockholders whom the court may hereafter designate.

This is error. Pioche is still an existing corporation, and the judgment belongs to it. (19 C.J.S., Corporations, §833d, pp. 254-55) Moreover, its creditors, if any, have rights against its assets that are superior to those of its shareholders. The judgment also confiscates a portion of the value of Janney's stock, which, so far as the record shows, is lawfully issued and outstanding. Its effect is to give his fellow shareholders a double recovery against him. We know of no rule of law or equity that supports this result. In these respects, the judgment must be reversed.

H. *The Orders Instructing the Receiver.*

Appeals Nos. 5 and 8 bring before us two orders instructing the receiver (28 U.S.C. §1292(a)(2)). The first is the ex parte order of March 20, 1962 It authorizes the receiver:

1. To employ counsel for Dolman as his counsel, on terms to be determined by the court.

2. To close the office of the corporations at Pioche and open an office at Las Vegas.

3. To employ a watchman at Pioche.

4. To open a checking account.

5. To advance $6,500 of his own funds, and issue to himself a receiver's certificate in that amount.

6. To pay a number of expenses:

(a) $300 per month for watchman.

(b) $100 per month for office overhead.

(c) Insurance premiums, in an amount to be determined.

(d) $1500 premium on his bond.

(e) $3500 to his attorneys for costs to be incurred in the Fidelity case.

(f) Up to $260 for expenses in preparing an inventory.

(g) Up to $500 for his travel and other incidental expenses.

7. To terminate any present employee of the corporations.
8. To take physical possession of all corporate assets.

The second is the order of May 24, 1962. This orders the receiver to take charge of the prosecution of the counterclaim of Pioche in the Fidelity case and for that purpose to retain counsel for Dolman. It restrains Janney and his attorneys from interfering with the receiver in so doing, and requires that they turn over to him all papers and evidence relating to the matter. It further authorizes the receiver to issue certificates, upon terms later to be authorized, and to use funds thus raised to pay the expenses of the litigation. The order expressly recognizes the right of Janney and his counsel to participate in the trial, "in cooperation with the Receiver and Intervenor [Dolman] and their counsel."

Since we hold that the appointment of a receiver was erroneous, these orders must be vacated. This does not, however, mean that none of the expenses authorized can be charged against Pioche or Ely. In effecting the final discharge of the receiver, the court must have a full accounting by him, upon notice and hearing. (*W. F. Potts Son v. Cochrane,* 5 Cir., 1932, 59 F.2d 375). The receiver is not personally liable for acts done by him within the scope of the authority conferred upon him by the court. (16 *Fletcher, Cyclopedia of Corporations,* §7864, p. 498 (Rev.ed. 1962)) Mr. Clark thinks that, although the receiver's appointment be erroneous, all costs of the receivership may properly be charged against the corporation's funds. (2 *Clark, Receivers* §637.1(m), p. 1065) Here, at least, we think not. The court has a discretion to charge the receiver's expenses either to the corporation or to the party who wrongfully obtained the receiver's appointment. (*Burnrite Coal Co. v. Riggs,* 1927, 274 U.S. 208).

The discretion of the court is to be exercised according to the justice and equity of each case. *Fulp v. McCray,* 8 Cir., 1927, 21 F.2d 951, 952. We think that Judge Hutcheson has well stated the rule that should be applied here. In *W. F. Potts Son v. Cochrane, supra,* he holds that those costs of the receivership that would not have arisen but for the appointment should be charged against the party invoking the receivership, here the

appellees. On the other hand, expenses that the corporation would have had to incur had there been no receiver, and expenses that confer a genuine benefit upon the corporation, should be charged to it. Here, the court has found that the appellees have acted in good faith, and we therefore think that the principles stated by Judge Hutcheson should be applied in this case.

In No. 17,709, it is ordered that:

1. Appeal No. 1, of November 6, 1961, appeal No. 2, of December 18, 1961, appeal No. 3, of January 4, 1962, and appeal No. 4 of February 5, 1962, are dismissed.

2. Insofar as the judgment awards $1,000,000.00 and costs against John Janney, it is affirmed; insofar as that judgment is in favor of the receiver, it is reversed, and the court is directed to substitute Pioche Mines Consolidated, Inc., a corporation, as the party in whose favor that part of the judgment is entered.

3. The judgment against Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. is reversed.

4. The order entering the defaults of those two corporations and striking their pleadings is reversed. The court is directed to reinstate their counterclaims.

5. The orders of December 16, 1961, January 24, 1962, and March 16, 1962, and the judgment, insofar as they direct the appointment of, or appoint the receiver, are reversed.

6. The orders of December 6, 1961, January 24, 1962, and March 16, 1962, insofar as they contain injunctive provisions, are reversed.

7. The judgment, insofar as it contains injunctive provisions against anyone other than appellant John Janney, his agents, servants, or employees, is reversed.

8. That part of the judgment which restrains John Janney from disposing of or otherwise hypothecating his stock in Pioche Mines Consolidated, Inc., Ely Valley Mines, Inc., and Pioche Power & Light Company, is reversed.

9. That part of the judgment which restrains John Janney and his agents from disposing of, transferring or removing any of the assets, properties, books, files, records and ac-

counts of Pioche Mines Consolidated, Inc. or of Ely Valley Mines, Inc., is affirmed.

10. Subparagraphs 1 and 2 of paragraph VIII of the judgment are reversed. Subparagraphs 3, 4, 5 and 6 of paragraph VIII are reversed and remanded. The court is directed to determine what portion of the services of the firm of Sullivan, Roche, Johnson & Farraher and Gerald O'Connor, Esq., and of Alvin N. Wartman, Esq., were rendered on and after June 6, 1961, and award to the firm a judgment for a corresponding portion of the sum of $200,000 and to Alvin N. Wartman a judgment for a corresponding fraction of $18,529.19, such judgments to be payable only out of the $1,000,000 recovered by Pioche from Janney, and only from sums actually collected in the proportion that the sums awarded to such attorneys, respectively, bear to the total recovery adjudged due to Pioche from Janney.

11. Plaintiffs may recover their taxable costs in the trial court from appellant John Janney, but no other costs or expenses.

12. The orders of March 20, 1962, and of May 24, 1962, instructing the receiver, are vacated.

13. The matter is remanded to the trial court with directions
    a. To modify the judgment in the manner hereinabove ordered.

    b. To enter a judgment that plaintiffs take nothing against Ely Valley Mines, Inc., or on its behalf, other than the portion of the injunction awarded against John Janney personally that is hereby affirmed, that the action be dismissed as against Ely Valley Mines, Inc., and that it recover its taxable costs in the trial court against plaintiffs.

    c. To vacate the appointment of the receiver, require him to account, settle his accounts in the manner herein approved, charge expenses of the receivership against such parties as may be appropriate under the principles stated in this opinion, require the receiver to deliver the respective properties, books, files, records

and accounts of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc., to them, and upon the settlement of his accounts and the completion of his duties, discharge him.

d. To take all other actions necessary to carry out the foregoing orders and such further proceedings as shall be consistent with this opinion.

14. Appellees are awarded one-half of their costs on appeal against appellant John Janney; otherwise, each party shall bear his, her, or its own costs on appeal.

In No. 18,192, the appeal is dismissed.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PIOCHE MINES CONSOLIDATED INC., ELY VALLEY MINES, INC., and JOHN JANNEY, *Appellants,* vs. HELEN DOLMAN, et al., *Appellees.*	No. 17,709

JUDGMENT

APPEAL from the United States District Court for the District of Nevada.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that Appeal No. 1, of November 6, 1961, appeal No. 2, of December 18, 1961, appeal No. 3, of January 4, 1962, and appeal No. 4 of February 5, 1962, be and each hereby is dismissed.

Insofar as the judgment awards $1,000,000.00 and costs against John Janney, it is affirmed; insofar as that judgment is in favor of the receiver, it is reversed, and the court is directed to substitute Pioche Mines Consolidated, Inc., a corporation, as the party in whose favor that part of the judgment is entered.

The judgment against Pioche Mines Consolidated, Inc., and Ely Valley Mines, Inc. is reversed.

The order entering the defaults of those two corporations and striking their pleadings is reversed. The Court is directed to reinstate their counterclaims.

The orders of December 16, 1961, January 24, 1962, and March 16, 1962, and the judgment, insofar as they direct the appointment of, or appoint the receiver, are reversed.

The orders of December 6, 1961, January 24, 1962, and March 16, 1962, insofar as they contain injunctive provisions, are reversed.

The judgment, insofar as it contains injunctive provisions against anyone other than appellant John Janney, his agents, servants, or employees, is reversed.

That part of the judgment which restrains John Janney from disposing of or otherwise hypothecating his stock in Pioche Mines Consolidated, Inc., Ely Valley Mines, Inc., and Pioche Power & Light Company, is reversed.

That part of the judgment which restrains John Janney and his agents from disposing of, transferring or removing any of the assets, properties, books, files, records and accounts of Pioche Mines Consolidated, Inc., or of Ely Valley Mines, Inc., is affirmed.

Subparagraphs 1 and 2 of paragraph VIII of the judgment are reversed. Subparagraphs 3, 4, 5 and 6 of Paragraph VIII are reversed and remanded. The Court is directed to determine what portion of the services of the firm of Sullivan, Roche, Johnson & Farraher and Gerald O'Connor, Esq., and of Alvin N. Wartman, Esq., were rendered on and after June 6, 1961, and award to the firm a judgment for a corresponding portion of the sum of $200,000 and to Alvin N. Wartman a judgment for a corresponding fraction of $18,529.19, such judgments to be payable only out of the $1,000,000 recovered by Pioche from Janney, and only from sums actually collected in the proportion that the sums awarded to such attorneys, respectively, bear to the total recovery adjudged due to Pioche from Janney.

Plaintiffs may recover their taxable costs in the trial Court from appellant John Janney, but no other costs or expenses.

The orders of March 20, 1962, and of May 24, 1962, instructing the receiver, are vacated.

The matter is remanded to the trial court with directions

a. To modify the judgment in the manner hereinabove ordered.

b. To enter a judgment that plaintiffs take nothing against Ely Valley Mines, Inc., or on its behalf, other than the portion of the injunction awarded against John Janney

personally that is hereby affirmed, that the action be dismissed as against Ely Valley Mines, Inc., and that it recover its taxable costs in the trial court against plaintiffs.

c. To vacate the appointment of the receiver, require him to account, settle his accounts in the manner herein approved, charge expenses of the receivership against such parties as may be appropriate under the principles stated in the opinion, require the receiver to deliver the respective properties, books, files, records and accounts of Pioche Mines Consolidated, Inc., and Ely Valley Mines, Inc., to them, and upon the settlement of his accounts and the completion of his duties, discharge him.

d. To take all other actions necessary to carry out the foregoing orders, and such further proceedings as shall be consistent with the opinion of this Court.

Appellees are awarded one-half of their costs on appeal against appellant John Janney; otherwise, each party shall bear his, her, or its own costs on appeal.

Filed and entered May 21, 1964.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN JANNEY, *Appellant,* vs. HELEN DOLMAN, *Appellee.*	No. 18,192

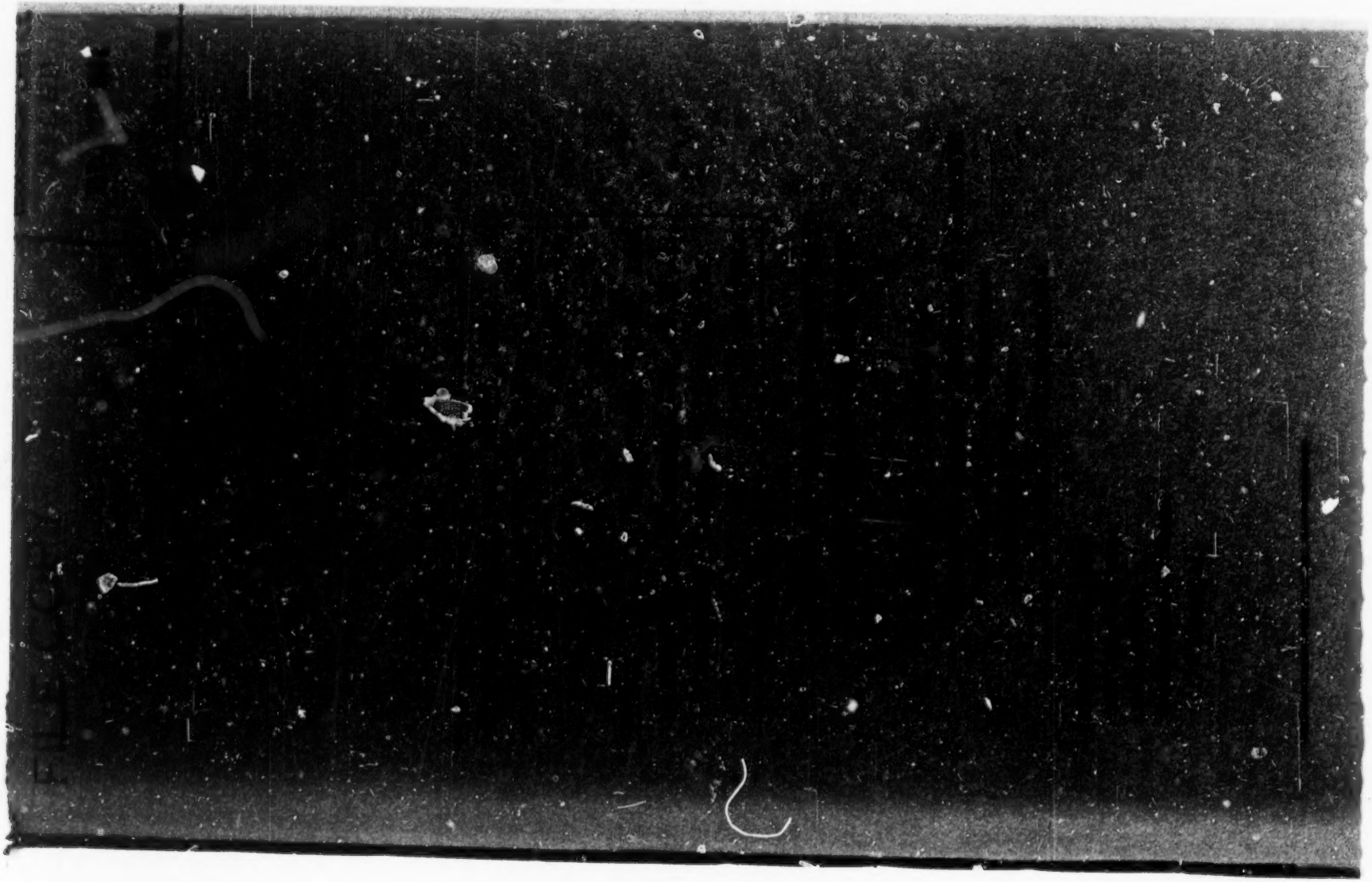
JUDGMENT

APPEAL from the United States District Court for the District of Nevada.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal in this Cause be, and hereby is dismissed.

Filed and entered May 21, 1964.



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 643

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JANNEY,
Petitioners,

vs.

HELEN DOLMAN, LAWRENCE RUST LEE, JAMES KEITH MARSHALL, JR., E. P. R. DUVAL, and KATHERINE HANSBROUGH,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Come now respondents above named and present herewith their brief in opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

The instant Petition for Writ of Certiorari purports to assert rights of certain corporate entities, but no such corporate rights are involved herein. An examination of the judgment of the United States Court of Appeals for the Ninth Circuit (Appendix, Petition for Writ of Certiorari, pages 35-37) shows that the only party adversely affected by said judgment is the individual petitioner, John Janney, to the extent of a money judgment against him and in favor of the corporate entities. As is shown in detail below, the instant petition represents but a further attempt by the said John Janney to utilize the corporate entities for his own personal advantage.

Contrary to the contentions in the said Petition, there are no general principles of law involved here, which are applicable to others, neither is there involved any conflict whatever between the decision of the Court of Appeals on the points raised by Petitioner and any decision of any other Court of Appeals or any decision of this Court.

The instant Petition constitutes but an attempt by the said individual, John Janney, to have this Court review certain factual determinations adverse to him made in the trial court and affirmed by the Court of Appeals. Such "second appeal" is, of course, not within the purview of certiorari proceedings here.

Magnum Import Co. v. De Sportuno Coty, 262 U.S. 159, 163; 67 L. Ed. 922, 924.

QUESTIONS PRESENTED

Under this heading, Petitioner John Janney sets forth certain "questions" purportedly involved in the instant proceedings. Such purported "questions" are, in fact, not involved in these proceedings at all.

In order to demonstrate the truth of this statement, it is necessary to examine the circumstances of the case as the same are reflected in the official record. Such official record differs considerably from the "statement of the case" advanced by Petitioner. This latter "statement" is also "loaded with assertions, innuendoes and assumptions," (Appendix to Petition, page 2) and it therefore becomes necessary to set forth a corrected "statement of the case" in order that this Honorable Court may ascertain what really are the "questions presented."

STATEMENT OF THE CASE

For some twenty or thirty years, petitioner Janney conducted the affairs of the corporations involved herein, Pioche Mines Consolidated, Inc., and Ely Valley Mines, Inc., as a one-man corporation, without any stockholders' meetings whatever being held, with the possible exception of one in 1943 (T. 2372). The secretary-treasurer of the corporations admitted that he had been appointed by Janney (T. 707), that he never pried into the minutes of the corporation (T. 708), that corporate minutes were maintained only

up until 1944 (T. 714), that he had never attended any board of directors' meetings in the several years he had been there (T. 716), that he destroyed plaintiffs' demand for stockholders' meeting (T. 718), that nothing was ever done with a demand for stockholders' meeting from some 69 stockholders (T. 722), that requests for financial statements were ignored (T. 718), that there was an almost complete failure to maintain stockholders' records (T. 735, et seq.), that a purported list of directors filed by the corporations with the Nevada Secretary of State was not correct (T. 741), that none of the purported directors had been elected by the stockholders (T. 760), that no meeting of the purported directors had ever been held except for one or two in 1942 (T. 761). Evidence was introduced showing that one purported director had resigned (T. 1419, T. 1415), another purported director had had nothing to do with the companies for thirty years (T. 1421), a third purported director had denounced Janney for his outrageous frauds on the corporations and their investors, reciting that all of defendant Janney's associates in the corporate venture had theretofore disowned him (T. 1422-1425). It was shown that defendant Janney had so maintained, or, more correctly, failed to maintain, stockholders' records for twenty or more years, that it was impossible to call a stockholders' meeting (R. 730, T. 570, et seq., T. 735-738, T. 1603, et seq.).

The trial court, upon such evidence, correctly found that "At all times mentioned herein defendant Janney has wrongfully controlled, completely, all of the af-

fairs of the above named defendant corporations, to the detriment of the stockholders thereof" (R. 1246), that corporate records of stockholders have not been maintained so that the stockholders of the corporations cannot now be ascertained (R. 1247), that no valid stockholders' meetings have been held since, in the case of one corporation, its incorporation in 1928, with one exception in 1942 or 1943, that no "valid board of directors have been elected" (R. 1247).

Extensive additional findings were made by the trial court concerning defendant Janney's wrongs to the corporation performed by him as a result of his one-man control. None of these findings of fact of the trial court were disturbed by the Court of Appeals.

Because of the above state of affairs, plaintiff and several other stockholders instituted a representative action on behalf of the corporations, which stated a cause of action against defendant Janney alone (R. 39). Defendant Janney's contention, in the instant Petition, that the additional plaintiff stockholders had not authorized the action, is pure nonsense (T. 581, 592, 616).

For more than one year, defendant Janney remained out of the jurisdiction to avoid service of process "upon advice of counsel" (R. 534, T. 324), in order to "avoid harassment" (T. 1611, 1612). Defendant Janney claimed to be detained in the East by work on the corporate records at his home in Virginia (R. 251), but the secretary-treaurer of the corporations admitted that there were no corporate records there (T. 1162).

Despite the fact that no cause of action whatever was stated against the corporations (the corporations having been made nominal defendants only for purposes of jurisdiction), defendant Janney caused an answer to be filed purportedly on behalf of the corporations (R. 243) while he continued to remain outside the jurisdiction.

Plaintiffs thereupon sought to take the deposition of the corporations by and through their president, defendant Janney (R. 305, 282). Janney failed to appear (T. 709, 712). There was no protective order from the Court, and motion for default was filed (R. 304). Subsequent attempts were made to take the deposition of defendant Janney on three separate occasions (R. 532, 648, 688). On none of these occasions did defendant Janney appear (T. 323, 324, 382). No protective order was ever obtained.

On the last mentioned occasion, the Court specifically directed defendant Janney to appear (T. 467).

Upon the last mentioned occasion, counsel for defendant Janney appeared and stated that his client would not appear unless the Court, prior thereto, granted certain demands made by him (T. 398, 460-463). A claim of illness was made at that time, but counsel for defendant Janney admitted that Janney was at that time conducting his regular business, and taking trips (T. 471, 402, 468). It was admitted by Janney's counsel that Janney could have attended the hearing (T. 423-426), and, finally, that Janney's failure to appear was *not* because of his claimed ill-

ness (T. 942). Though the trial court offered to defer action if defendant Janney would appear, counsel for defendant declined (T. 482-486). The trial court attempted to verify the claim of illness by independent physicians (T. 408), which attempt was refused (T. 428-429, 460).

Upon this state of facts, the trial court entered the default on plaintiffs' complaint which, as above noted, stated a cause of action against defendant Janney alone for his wrongs against the corporation. These actions were upheld by the Court of Appeals (Appendix, Petition for Writ of Certiorari, pages 13-18).

The trial court thereupon conducted a trial which lasted one month (T. 507, 2514) which, though denominated a default hearing, involved an exhaustive presentation of evidence in which defendant Janney and his counsel fully participated. The evidence concerned Janney's wrongs to the corporations and their stockholders and showed, among other things, that defendant Janney, individually, misappropriated in excess of one million dollars of corporate assets. The evidence is reviewed in some detail by the Court of Appeals (Appendix, Petition for Writ of Certiorari, pages 20-23), and need not be reviewed here.

The judgment against defendant Janney for one million dollars (R. 1240), based upon proper findings (R. 1248), was, of course, upheld on appeal (Appendix, Petition for Writ of Certiorari, page 35).

This, essentially, is the judgment, affirmed on appeal, that defendant Janney now seeks to have this

Court review, under the guise of asserting "corporate" rights. To whatever extent the corporate entities have any interest to assert, as distinguished from the interests of defendant Janney, those interests are asserted in their counterclaim, which has been ordered reinstated by the Court of Appeals (Appendix, Petition for Writ of Certiorari, page 35).

It is therefore clear that the only true "question presented" in the instant Petition is whether Petitioner Janney may further use the corporate entities for his own individual purposes. In effect, Petitioner Janney is here attempting to assert that the corporations should not have the benefit of the million dollar judgment entered in their favor and against him!

INDISPENSABLE PARTIES

Under this heading, and under the headings "Indispensable Parties Damaged by Judgment" and "That the Judgment is 'In Favor of Pioche Consolidated' does not cure the Defect of Not Hearing Indispensable parties," Petitioner Janney argues that the corporate entities are indispensable parties in any representative suit, citing a host of authorities for this basic proposition of law.

The plain and simple answer to this contention is that the corporate entities are parties to the instant litigation, and have been from the outset.

"FUTURE LITIGATION"

Under this heading, Petitioner Janney argues that there may be future litigation arising out of the facts of this case.

Whether true or not, this contention, of course, furnishes no basis for the issuance of a writ of certiorari.

"BASIS FOR DEFAULT"

Under this heading, Petitioner Janney, if we understand correctly, argues that the trial court could not enter his default since he had, prior thereto, applied for relief under Rule 30(b) F.R.C.P.

Once again, the answer to this contention is clear and simple. As is shown in detail in the decision of the United States Court of Appeals (Appendix, Petition for Writ of Certiorari, pages 13-19), Janney's demand for relief under Rule 30(b) was rejected by the trial court, which said action was almost compelled by the factual circumstances described above. It would indeed be extraordinary if a litigant were permitted to control litigation, rather than the Court.

"BASIS FOR JUDGMENT"

Under this heading, Petitioner Janney argues, in effect, that the factual determinations made by the trial court, and sustained by the Court of Appeals, are in error.

Here again, the correctness of the determination of the trial court was reviewed by the Court of Appeals, and sustained (Appendix, Petition for Writ of Certiorari, pages 20-23). This obviously furnishes no ground for certiorari here.

CONCLUSION

It is respectfully submitted that Petitioner has failed completely to show any valid ground whatever for issuance of a writ of certiorari in the instant proceedings, and that the petition for the same should therefore be denied.

Dated, San Francisco, California,
December 23, 1964.

ARTHUR H. CONNOLLY, JR.
SULLIVAN, ROCHE, JOHNSON & FARRAHER
Counsel for Respondents.

JAMES FARRAHER
Of Counsel.

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In the Supreme Court

OF THE

United States

OCTOBER TERM 1964

No. 643

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JANNEY,
Petitioners,

vs.

HELEN DOLMAN, LAWRENCE RUST LEE, JAMES KEITH MARSHALL, JR., E. P. R. DUVAL, and KATHERINE HANSBROUGH,
Respondents.

PETITIONERS' ANSWER TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONERS' ANSWER TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

This case involves a million dollar default judgment that was entered without allowing a hearing under Rule 37(d).

Two of the wrongfully defaulted defendants have had their defaults set aside, yet the judgment stands. The wrongfully defaulted defendants face economic ruin.

The "without-due-process of law" provision of the Constitution is designed to give protection from what in this case amounts to complete disaster, after years of effort and over a million dollars of invested money, in building an industry on a sound economic basis.

All three defendants were defaulted. The default of the two defendant corporations has been reversed on appeal and their counterclaim ordered reinstated (Opinion, Appendix to Petition for Certiorari, p. 32). The counterclaim (R 61) deals with the failure to comply with Rule 23(b) (R 63) but the judgment concludes that Rule 23(b) was complied with.

The corporations thus have been denied a hearing where *proof,* rather than allegation, is required. The default resulted in the question of compliance with Rule 23(b) being determined as a matter of *allegation.* Had the corporations been allowed a hearing on the merits, *proof* of these allegations would have been required. The failure of respondent's counsel to *prove* compliance with Rule 23(b) would have defeated the action, and a hearing thereon would have demonstrated a *refusal* of Respondent Dolman to present her purported grievances to the stockholders.[1]

In addition, a hearing requiring proof of the 23(b) allegations would have disclosed that *no qualified plaintiffs supported the action.* Affidavits are dis-

---

[1]A verbatim typescript of the proceedings at a stockholders' meeting attended by Dolman shows that she flatly *refused* the request of the other stockholders that she state to them the basis of her complaints. This refusal is unmistakable:

"Mr. Connolly. Calling your attention to the fact that in your own letter to my client you stated that many things were not included in the notice of the meeting that should be

cussed later that show that the names of all of the associated plaintiffs were used without their knowledge or consent.

Indispensable parties defendant also were excluded and not allowed to be heard. Setting aside their default does not remove the effect of a judgment that is adversely affecting them, which is affirmed against their interests, without their having an opportunity to be heard.

The default herein was based on the absence of only one defendant at his deposition because of a serious physical condition, where the time selected was made

---

discussed. And as I recall, you told me that one of Mr. Janney's habits was not to let the stockholders know about anything that went on up here." (R 1314:13-18.)

"Mr. Janney. I'd like to know what the things are that we have concealed. I have got a right to ask that question." (R 1314:20-21.)

"Mr. Kennedy. I think it should be answered." (R 1314:23.) . . .

"Mr. Janney. *What is it that we ought to reveal to stockholders that we have withheld?*

Mrs. Dolman. *I am not on the board of directors.*" (R 1315:5-20; emphasis added.) . . .

"Mr. Janney. I think that information that has been withheld should be let out and put right on top of the table.

Mr. Connolly. Mrs. Dolman, you are the only one that can say. . . ." (R 1320:13-31.)

"Mr. Janney. . . . I would like to ask Mrs. Dolman as a special favor to me personally, as well as for the purposes of the meeting, to state what these people said on what there was that I neglected to say that I should have said.

Mrs. Dolman. *No comment.*

Mr. Janney. What do you mean, 'No comment'?

Mrs. Dolman *I have nothing to say.*

Mr. Janney. You said——

Mrs. Dolman. *I have nothing to say.*" (R 1326:30 to 1327:11; emphasis added.)

This material was not before the Trial Court because of the default of all defendants. It was presented to the Appellate Court by affidavit (R 1432, R 1439).

with the knowledge of the illness of the party notified. There was no trial as to the cause or the willfulness of absence.

No notice was given for a hearing to allow evidence of the reasons for the non-appearance of defendant Janney for deposition; nor a hearing as to the serious nature of the illness; nor the reasons for the order of a competent Doctor requiring a period of complete rest from mental strain, nor the advice of another doctor for a complete change of mental surroundings.

Through this error, there was excluded testimony as to the thorough medical examination of a competent Doctor and confirmation of diagnosis by another and the treatment later rendered by a third.

Rule 37(d) required a hearing with notice as to the willfulness of the absence of this defendant. For exploring this necessary fact there was no hearing allowed, but the default was ordered. Default procedures then resulted in a false picture replacing facts, with the court accepting the false picture.

As a specific example of how false and misleading testimony is *invited,* by default proceedings which deny the right to cross-examine the witness, the following is taken from the Record:

> Respondents' attorney quoted from the resolution of the Board of Directors of Pioche Power and Light Company wherein was approved the offer of Mr. Janney to assume the interest charge of $2,408.18 plus principal owing to Pioche Mines Consolidated, Inc. in the amount of $4,000.00. Total—$6,408.18.

Plaintiff Dolman then testified as follows:

"Q. Offhand do you know, Mrs. Dolman, what percentage of the total stock that gives Mr. Janney in this Pioche Power and Light Company?

A. I couldn't give you the percentages, but it would give him the controlling interest. . . .

Q. You say he has a controlling interest in the Pioche Power and Light Company. Now, *that obligation that was* assumed by Mr. Janney, or *purportedly assumed by Mr. Janney,* of a debt owed by Pioche Mines Consolidated, *was that ever paid to Pioche Mines Consolidated by Mr. Janney?*

A. Not to my knowledge.

Q. Have you checked the records for that transaction?

A. Yes, I did.

Q. Anyone else do the same?

A. Yes.

Q. Who was that?

A. Yourself, Mr. O'Connor (of counsel for Respondent Dolman herein)" (T. 1430:13-25, emphasis added).

The documents referred to in this testimony showed exactly the opposite. For instance, the Journal Entry of Pioche Mines Consolidated, Inc., Plaintiff's Exhibit 10, page 968, for the month of August, 1939 shows:

"Advanced by stockholders—John Janney accounts receivable—Pioche Power and Light Company to credit account of Pioche Power and Light Company with $6,408.18, *amount assumed by Mr. John Janney and charged against his personal advance account.* $2,408.18 interest charge to be paid and $4,000.00 applied to principal as agreed.

> $6,408.18" (page 968 of Plaintiff's Exhibit 10, reproduced in Record on Appeal, Vol. 23, page 2970, Emphasis added).

If allowed to be heard, Petitioners could show that $13,564.79 was still due to Mr. Janney for cash that he had advanced to the company, after the $6,408.18 was deducted.

The records of Pioche Power and Light Company also show the sum of $6,408.18 had been paid (R. 1259).

The stock records of Pioche Power and Light Company, (R 1257, R 1258) contradict the accusation that Mr. Janney acquired the controlling interest of Pioche Power and Light by this transaction.

The affidavit of Howard M. Calhoun shows:

> "That he is Secretary of Pioche Power and Light Company, and has possession and custody of the Stock records, and books of that company. . . .
>
> "4. That John Janney's 200 shares were more than a majority of the 295 shares of the outstanding Capital Stock of Pioche Power and Light Company prior to his assuming the debt to Pioche Mines Consolidated, Inc. . . .
>
> "8. After Certificate No. 18 for 574 shares of stock was issued in consideration for assuming the $6,408.18 debt to Pioche Mines Consolidated, Inc. there were 8 stockholders of record holding a total of 869 shares of outstanding Capital Stock and *John Janney's position, as the controlling stockholder, remained unchanged by the transaction*". (R 1257, R 1258, emphasis added).

This material was not before the Trial Court because of the default.

It was presented to the Appellate Court by affidavit (R 1438, R 1439).

Nevertheless, the Trial Court's finding was as follows:

> "10. An asset of defendant corporation's Pioche Mines Consolidated, Inc. was wrongfully converted to his own use by the said John Janney, to-wit, a monetary obligation owed to said corporation by the Pioche Power and Light Company, without any adequate consideration therefor" (T 1248).

Thus the erroneous testimony of Plaintiff Dolman as to what appeared in these records, was the basis for the Court's finding. This false testimony was assisted in this result by her attorney. (T 536):

> "That debt that John Janney says, 'I will take over' . . . that debt from Pioche Power and Light Company to Pioche Mines Company actually never was paid," (T 536).

T 535:

> ". . . We will show Pioche Power and Light Company belongs to Pioche Mines Company and that John Janney stole it from the stockholders of Pioche Mines Company . . . ." (T 535).

Another example of how default procedures have led in this case to completely erroneous conclusions on complicated issues is the matter of the Ely Valley Mine.

Ely Valley Mine

Errors invited by default procedure are here shown where parties who occupy the position of indispensable parties, are not allowed to cross-examine witnesses while giving consideration to the ownership of the Ely Valley Mine.

All the documents which establish the facts relating to this matter were confused to the Court as a result of default procedures. These errors were not permitted to be called to the attention of the Court by the defaulted defendant Ely Valley Mines, or by defendant Pioche Mines Consolidated.

An illustration:

1. "Q. (By Mr. O'Connor) So in 1928 you took the Ely Valley Mine away from the Pioche Company, in effect?

   Mr. Horton. Objection.

   The Witness. (Mr. Janney) Never took it away from them" (T 2339, Dec. 14, 1961)——

   "Q. Yes, and in 1928 you took away—that was the word you used yesterday——

   A. I didn't state——

   Q. Whatever you used——

   A. I can give you a correct statement.

   Q. What?

   A. If you want, I can give you a correct statement.

   Q. Well. I am trying to recall what you said yesterday. Withdraw the question." (T 2368, Dec. 15, 1961).

2. At T 1916:10 the Trial Court asks counsel for Respondent Dolman if any damages whatever

were asserted for mismanagement, to which said counsel responded:

"Mr. O'Connor: Not a penny." (T 1916:12).

3. Counsel for Respondent Dolman specifically declared that the Ely Valley Mine had:
"nothing to do with the amount of damages." (T 2301:17, 18).

4. Again, at T 2278:5-7, counsel for Respondent Dolman is shown to have:

"withdrawn any reference to the Ely Valley Mine." (T 2278: 5-7).

Thereby counsel closed the door at the default hearing to the proof of the falsity of his representations.

At T 677, Respondent's counsel represents that expenditures made by Pioche Mines Company on the Ely Valley Mine from November 30, 1923 to November 30, 1928 (during which period Pioche Mines Company had a lease and option on the Ely Valley Mine), were "closed-into Mine Development" (T 677: 14).

Counsel then represents that ALL moneys spent by Pioche Mines Company for "Mine Development" were spent on the Ely Valley Mine alone! Counsel states: "The Ely Valley account is the amount of $491,225.95" (T 678:11, 12).

Had Petitioners been allowed to be heard, they could have shown that the figure of $491,225.95 would cover amounts expended in an extensive development program on its entire mine holdings, over a period of many years; that the amount spent by Pioche Mines *Company, (not* Pioche Mines Consolidated) to main-

tain the Ely Valley lease was barely enough to hold the unpatented mining claims, which Pioche Mines Company was obligated to do by virtue of its lease and option to acquire the property; that the "considable expenditures" (Opinion, p. 22) in mine development work expended by Pioche Mines Company on leased properties, were actually spent on *other* properties, some three miles distant from the Ely Valley Mine; that all of the funds expended by Pioche Mines Company at this period on either the Ely Valley Mine or on the other leased properties were supplied by John Janney; that he was never repaid for these advances by Pioche Mines Company; that John Janney, after the lease and option of Pioche Mines Company on the Ely Valley Mine expired, did the assessment work and paid the taxes on the Ely Valley Mine, as he did with other mining properties that he owned; that these mining properties *including the Ely Valley* Mine, were the very properties referred to by counsel for Respondent Dolman as belonging *to John Janney,* when they represented John Janney and Pioche Mines Consolidated in the counterclaim they prepared and filed against Fidelity-Philadelphia Trust Company (R 26, par. 5); and that Respondent's counsel joined with Respondent Dolman's demand that this very counterclaim against Fidelity-Philadelphia Trust Company be surrendered, or "ruinous" litigation would follow.

(This endorsement of Dolman's handwritten demand (Exhibit L-2) is indicated by her use of the letters "T.R." (Theodore Roche, the head of Respon-

dent's law firm). The letter is reproduced in part at pp. T 3044-T 3046 of Vol. 23. The exhibit was rejected by the Trial Court (T 1943) because of the default).

Counsel also represented that Pioche Mines Consolidated, Inc., "claimed and represented to prospective stockholders and represented to the Securities and Exchange Commission that it had a long term leasehold interest on Ely Valley Mine" (T 791) which "had at least eighteen years to run." (T 791) He represented that the SEC prospectuses showed this (T 791). What the prospectuses actually showed (pp. T 2947,ff.) was a long term lease on the Raymond and *Ely* Mine, and the Meadow *Valley* Mine, together with five other mines. (See T 2948 in Vol. 23 of Transcript), *not one* of which was the Ely Valley Mine. The Raymond and Ely and Meadow Valley mines lie near the eastern edge of the town of Pioche. The Ely Valley Mine is three miles distant, to the West. (See map on page T 2950).

Pioche Mines Consolidated had no lease, no option or any other interest in the Ely Valley Mines (T 2947, T 2948).

The position of the Ely Valley Mine in the serious effort to establish a mining industry in Pioche is most clearly shown by the statement of the duties of the Trustee under the Ely Valley Trust Agreement.

In that document (Exhibit A attached to Plaintiff's Exhibit 19, T 2994-T 2997) Mr. Janney, the President and leading stockholder of the Pioche Mines Company, as owner of the property known as the Ely Val-

ley Mine, conveyed it with a group of surrounding properties, to a Trustee.

The Trustee's duties and obligation were set forth in detail in that four-page agreement where the Trustee was authorized to hold the said property, to borrow money using it as security, to spend the money for work on the mine,

> ". . . and in addition the party of the second part Trustee agrees to guard the stockholders interest in the Pioche Mines Company, a Nevada Corporation, and to protect their rights in the event of action adverse to their interest, or in any matter affecting their rights, whether as stockholders of the Pioche Mines Company or as stockholders in exchange for shares in the Pioche Mines Consolidated, a Nevada Corporation, and in event of litigation affecting the interests of the stockholders of the said companies to provide, if possible, by the use of the properties herein conveyed in trust, such money as may be needed for the protection of the interests of the said stockholders . . ." (T 2995).

The Trustee is further authorized,

> "to borrow money on the security of the property held in trust by him under this agreement for the uses and benefits aforesaid, or he may sell and convey an undivided fractional interest in the said property, or any part thereof, but not to exceed a 25% interest, or he may borrow money for the uses aforesaid and grant an option under and by virtue of which the said loan may be converted into a payment for an interest in said property as aforesaid, or said loan or loans

may, at the option of the lender, be represented by or converted into shares of Treasury stock in a corporation, which is proposed later to be formed for the operation of the above named mining claims." (T 2995).

"It is further agreed that said Trustee is authorized and empowered to form a corporation when in his judgment it may become necessary or advisable so to do in carrying into effect the purposes of this trust." (T 2996).

If the parties in interest would be allowed to be heard—one the owner of the property, Ely Valley Mines, Inc.; *the other* the Pioche Mines Company (which had held an option and lease which it had abandoned); it could be shown by competent evidence, instead of by statements unsupported by evidence:

1. The amount of money used for the protection of the stockholders and how used.

2. The amount used for the development and equipment for the property.

3. The production from the mine and how expended; what profits were distributed, and what were put back in equipment and development.

4. The requirements of the War Production Board contracts.

5. The agreements with which first the trustee and then the directors had to deal, and the steps taken to discharge all obligations under these contracts and claims that would represent disputed demands, if any.

The statement of counsel should not be the basis for the disposal of the rights of absent parties—certainly not if the parties were not allowed to be heard, and their default was declared error on appeal.

PIOCHE MINES CONSOLIDATED DIRECTORS

Pioche Mines Consolidated as result of the 1942 Settlement agreement became merged with two other companies—Pioche Mines Company and Nevada Valcano Mining Company. This was effected by the vote of the stockholders of the three companies in December 1943 where was accepted the offer made by the debenture holders.

It was provided that a designated board of directors be elected, one of which directors represented the debenture holders. This board must continue until their successors are duly elected which could not be until the settlement agreement was carried out to the extent that the exchange of shareholders progressed far enough to provide a complete corporate organization.

The Trust Company and the Bondholders failed to complete their agreement, failed to exchange the securities, and then used their positions to block financing efforts. This is an issue raised in the pending counter claim action. In the decision reported in 202 Fed 2d 949 the Court ordered the Trust Company action dismissed—in 206 Fed 2d 336 the counterclaim is ordered reinstated.

This is the counterclaim held up until 1958 by failure of the District Court to carry out the Circuit Court of Appeals order of 1953 and the Mandamus order of 1956 and held up from then on until now by the Dolman litigation which is now declared illegal on appeal.

During this delay in completing the exchange of securities the stockholders meetings of old companies have been held in adjourned session, with some shares exchanged and some not exchanged, leaving the newly merged company with no completed lists of stockholders sufficient to bind the absent stockholders.

The Board of Directors elected under the agreement have kept taxes paid, the assessment work done, the properties protected and in good condition and necessary expenses have been provided without calling on stockholders.

Meantime, the Nevada Statute provides that the present Board must continue until their successors are duly elected.

QUESTIONS PRESENTED

Petitioners' questions are not answered by Respondent's brief. Respondents "corrected" statement of the case is nothing more than pulling from the record a parade of accusations on which the right to require proof or to cross-examine was denied because of the default.

The seriousness of these accusations serves to emphasize the importance of allowing Petitioners the right to be heard on them.

The corporations were denied the right to be heard on whether one of their directors (Baker) "had denounced Janney for his outrageous frauds on the corporations and their investors" (Opposition, page 4), or whether Mr. Baker's position is as stated in his Petition for Rehearing, namely, that the corporations' President was an honest and efficient mine manager, on the basis of whose integrity and ability, fully informed investors, including Mr. Baker, had invested hundreds of thousands of dollars.[2]

Another example of where the corporations were excluded is cited in footnote 3. Many other examples could be given.

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[2]"2. Petitioners represent, either in themselves or through their immediate families a cash investment in Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. of $500,000 or more. . . .

"8. Prior to the commencement of the instant litigations, the reputation of Appellants' President as a competent, honest and efficient mine manager, was excellent, and this reputation was a principal contributing factor in the investments made by Petitioners in the Appellant corporations.

"9. Petitioners have personal knowledge of one or more of the allegations found to be true by the Trial Court and approved by this Court in affirming the million dollar default judgment, and assert that said allegations are false, and petitioners have not been heard in the determination of these issues.

"10. Major financing of Appellant corporations will be necessary promptly in order to repair the properties of Appellant corporations and to prevent further damage or destruction.

"11. If said million dollar default judgment is allowed to stand, on which Appellant corporations and Petitioners' representatives have not been allowed to be heard, this indispensable financing will be impossible.

"Respectfully submitted,
Richard K. Baker, . . ."

(Petition for Rehearing, sworn June 15, 1964, filed with the Court of Appeals, pages 1-3).

[3]Respondents charge (Opposition, page 4) that a "purported director had had nothing to do with the companies for 30 years (T 1421)". The basis of this statement (T 1421) is Mrs. Dolman's

The truth or falsity of such accusations is a matter of *corporate* concern, yet neither corporation was heard.

Additionally complicated charges such as appear in this case cannot be expected to be correctly determined in default proceedings.

STATEMENT OF THE CASE

Respondents' Brief in Opposition (page 3) claims that Petitioners' Statement of the Case does not correctly represent the circumstances of the case. However, Respondents have failed to show a single instance in which Petitioners' Statement of the Case is inaccurate, or in which a "question presented" does not apply to the instant case.

Indispensable Parties Plaintiff Absent

Respondents' Brief contends (p. 5) that T 581, T 592, and T 616 are authorizations to bring the suit on behalf of the four co-plaintiffs, who alone had standing to sue (Opinion, p. 28).

Answer: 1. None of the communications are addressed to Respondent Dolman's counsel. They were addressed to Mrs. Dolman.

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hearsay representation of what a *Mr.* Forbes of Washington, D. C. is supposed to have said to her; whereas the Member of the Board of Directors is *Colonel* Forbes *of Philadelphia*. Colonel Forbes is the Director who represents the bondholders, and was one of the Directors who signed the Trust Agreement of 1960 on behalf of Pioche Mines Consolidated, Inc., thereby making this agreement an act of the Corporation by the unanimous written consent of the Board of Directors, as provided for in the by-laws.

2. They were not instructions to Respondent's attorneys, or to anyone else, to bring this suit. They were at most an expression of willingness to assist at some future time, presumably after the bases for the suit that were represented in Mrs. Dolman's communications, were demonstrated to be true, rather than false.

3. Each of the bases that was represented to these stockholders as reason for suit was withdrawn: T 1731:12-T 1732:16 (sale of equipment to Calaveras); T 1739:23-T 1745:15 (Oriental Refining); T 1764:21-23 and T 1771:1-5 (Cobb-Stringer Drilling); T 1772:15-T 1773:3 ($106,000.00 item); T 1771:11-T 1772:3 (Denver Oil).[4]

4. One of the stockholders who had personal knowledge of the purported "facts" on which the judgment was sustained on appeal knew to his knowledge that these "facts", were false. (See Affiidavit of Lawrence Rust Lee, p. 3, appearing in Vol. 24 of the Transcript of Record.)

5. Even had this stockholder:

(a) given an express direction to Respondent's attorneys to bring a given suit in his name, and

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[4]Despite the dropping of these charges, and the fact that no defendant was heard thereon, the Trial Court found:

"11. Assets of said corporation have been wasted through improvident investments without adequate consideration therefor." (R 1248, lines 8, 9) "The *corporations* also have an interest in defending against such charges, yet they were wrongfully deprived of the right to be heard."

(b) directed that the suit be brought on the basis of the claims contained in Mrs. Dolman's communications to that stockholder,

this would *not* have been an instruction to *withdraw* the stated claims, or to bring *another suit* based upon purported facts that the "co-plaintiff" knew to his own knowledge were false.

6. Mr. Duval (one of the indispensable "co-plaintiffs") wrote to Mrs. Dolman:

> "I will be glad to join you in the Pioche Mines suit *under the conditions mentioned in your letter, namely: that I 'incur no expense' and that I will 'never be called as a witness or have to appear in any action.' Both of these conditions are very necessary, as I am 88 and nearly blind and have very little more than enough to pay my keep in a house for old people, and a trip to California would be impossible.*" (Plaintiffs' Exhibit 2. The italicized matter does not appear at T 581.)

These two "conditions" are impossible of performance, and therefore, even Mr. Duval's expression of willingness to join at some future time is void.

However, Mr. Duval's name was thereupon used to give standing to Mrs. Dolman's charges, without Mr. Duval ever being informed of this fact.

He first learned that his name was being used upon being served with process out of the United States District Court for the District of Idaho.[5]

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[5]The Idaho action arose when Mrs. Dolman and Mr. Campini registered the Trial Court's judgment while an appeal was pending therefrom, in violation of 28 U.S. Code, Sec. 1963.

Thereafter, on October 2, 1964 Mr. Duval swore that he had never employed Respondent's counsel and was unaware of the unauthorized use of his name.[6]

7. Miss Katherine Hansbrough, another indispensable "co-plaintiff", was also served with process in the Idaho action. Thereupon she swore that she had never authorized or retained Respondent's attorneys in any capacity and that Dolman and her attorneys had refused to cease and desist from the unauthorized use of her name.[7]

8. The fourth "co-plaintiff", listed as "James Keith Marshall, Jr.," is dead. Respondents cite nowhere in the record any claimed authorization from Mr. Marshall to bring the instant proceedings in his behalf.

The affidavit of Mr. Marshall's widow, who now holds his stock, shows that there was and is no such person as "James Keith Marshall, Jr." and that the

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[6]"Affiant has not employed counsel for Plaintiffs or any of them to represent him in any action . . . The service of this process was the first notice Affiant had of this unauthorized use of Affiant's name by these attorneys . . .

"Because of Affiant's never having authorized his name to be used in the institution or prosecution of this suit and being informed that his name has been so used without his authorization, Affiant believes himself to be without remedy to prevent the continued unauthorized use of his name otherwise than requesting this Court to remove Affiant's name from the record of this case, and that any and all appearances purportedly made in Affiant's behalf by attorneys of record herein be stricken from the record." (Affidavit of E. P. R. Duval, sworn October 2, 1964).

[7]"Affiant has never authorized Sullivan, Roche, Johnson, and Farraher to appear for her in any action, nor has she ever retained them to perform professional services in her behalf. . . ." (Affidavit of Katherine Hansbrough, sworn October 19, 1964).

use of this name by Respondent's counsel was unauthorized and "unknown to her."[8]

Thus, it will be noted: (1) No authorization from the four "co-plaintiffs" appears in the record instructing the institution of the instant suit by counsel for respondent Dolman herein: (2) The communications addressed to Mrs. Dolman were induced by fraudulent charges that were later withdrawn: (3) Each of the purported "co-plaintiffs," affirmatively repudiated the act of the attorneys for Respondent Dolman who used their names without authority.[9]

The default of all defendants prevented the development of the testimony of these "co-plaintiffs."

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[8]"1) That she, Lockett Walton Marshall, is the surviving widow of James Keith Marshall who died testate in Fauquier County, State of Virginia, on the 16th day of September 1961.

"2) That she was apprised at a later date, that is, after the death of the said James Keith Marshall, that the above captioned litigation had been instituted in the U.S. District Court for the District of Nevada with one of the parties plaintiff being named or shown as James Keith Marshall, Jr.

"3) Affiant states that there was and is no such person as James Keith Marshall, Jr. to the best of her knowledge and that the use of James Keith Marshall, Jr. if purported to be James Keith Marshall of Fauquier County, State of Virginia, was entirely unauthorized and unknown to her.

"4) Affiant states that her husband, the late James Keith Marshall was the owner of certain stock certificates issued by Pioche Mines Consolidated, Inc., which certificates are now in her hands by virtue of the Will of the late James Keith Marshall.

"5) Affiant respectfully requests this Court to remove the name of James Keith Marshall, Jr. from the records of this case and that any and all appearances purportedly made on behalf of James Keith Marshall, Jr. by attorneys of record herein be stricken from the record." (Affidavit of Lockett Walton Marshall, October 21, 1964).

[9]The revelation that Respondent's counsel actually had no authorization from the four co-plaintiffs occurred in the Idaho action. This revealment was made possible by that Court's Order of Service on out-of-state parties, pursuant to 28 U.S. Code, Sec.

This testimony was material to the right of Respondent Dolman to maintain her suit in Court at all.

Thus, it is not "pure nonsense" (Respondent's phrase, Brief in Opposition, p. 5) for Petitioners to assert that the parties that were indispensable to the maintainance of the action, and whose names were added by counsel for Respondent Dolman, did not authorize the suit to be brought (Petition, pages 3, 9).

Default Excluded All Petitioners

Respondent's Brief in Opposition claims on page 7 that the default hearing was actually a trial in which Petitioners "fully participated".

Answer: The record is the answer:

1. "Mr. Horton (of counsel for Petitioners): Your Honor, may we object to counsel's presumptions in this regard and to the irregularities of the presentation relative to the proceedings now before the Court?

Court: I am not going to entertain your objection . . ." (T 849:8-12)

2. "Mr. O'Connor (of counsel for Respondent Dolman): . . . 'the said John Janney failed to appear at the designated time and place without any valid reason for so failing to appear.'

Mr. Horton: If Your Honor please, I would like——

1655. The hapless "co-plaintiffs" could not be directly contacted by Petitioners because they purportedly were being represented by counsel. Thus, Respondent's counsel were able to keep their uninformed "clients" in the dark until the Idaho Court entered its "Order for Service", producing the above sworn repudiations of counsel's claimed authority.

Court: No—no I can't hear you, you are in default and don't forget that.

Mr. Horton: Well, I would like to state——

Court: I don't want to hear you.

Mr. Horton: I would like to state that the representations——

Court: No—No——

Mr. Horton: —of counsel are incorrect.

Court: I don't want to hear you at all. Sit down." (T 710-T 711)

3. "Mr. O'Connor: . . . Now, with the Court's permission I would like to address myself to our application for the appointment of a Receiver . . .

Mr. Horton: Can we be heard on that question?

Court: No, it is a default case, you are in default.

Mr. Horton: We still have the question so far as Receivership is concerned.

Court: You are out; . . .

Mr. Horton: We would like to put on evidence in regard to this.

Court: No, you are not going to put on evidence at all. You are in default.

Mr. Horton: I would like to correct facts that have been misrepresented by counsel and not supported by the evidence.

Court: You are observers as far as all objections in this case are concerned, . . ." (T 1579:7-20, T 1619-1621)

4. "Court: You must remember you are in default.

Mr. Horton: We are not in default on the question of damages.

Court: You are in default on the question of damages . . . ." (T 1536:21-25)

5. "Mr. Horton: Your Honor, may we be heard on that?

Court: No, you are not going to be heard. Sit down. I will tell you when you can be heard. You are in default and you don't seem to understand it. I am going to hold you rigidly to this Rule." (T 1138:23-T 1139:2)

7. "Mr. Horton: Can we answer our opponent——

Court: Sit down or I will call a Marshal." (T 1238:18, 19)

8. "Mr. Horton: May we be heard?

Court: No." (T 2663:24, 25)

9. Respondent's counsel withdrew all purported claims of mismanagement.[10]

The disclaimer of claims for damages[11] was used to prevent the exposure of the falsity of the claims. When a specific matter was disclaimed as a basis for damage, the door was immediately closed to Petitioners to expose the falsity of the charge.

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[10]At T 1916:10 the Trial Court asks counsel for Respondent Dolman if any damages whatever were asserted for mismanagement, to which said counsel responded:

"Mr. O'Connor: Not a penny." (T 1916:12)

Counsel for Respondent Dolman specifically declared that the Ely Valley Mine had:

"nothing to do with the amount of damages." (T 2301:17, 18)

Again, at T 2278:5-7, counsel for Respondent Dolman is shown to have:

"withdrawn any reference to the Ely Valley Mine." (T 2278:5-7)

[11]T 1731:12-T 1732:16; T 1739:23-T 1745:15; T 1764:21-23 and T 1771:1-5; T 1772:15-T 1773:3; and T 1771:11-T 1772:3.

Finally, at T 1784:17-20 respondent Dolman, who swore the complaint that had to be sworn under Rule 23(b), testified that she could *not* say "any specific item of damage collectable against Mr. Janney by the corporations" when the suit was brought.

Examples of disclaimers by counsel for Respondents are set forth in the footnote.[12]

No Notice to Deponent Under Rule 37(d)

Respondent's Brief in Opposition does not deny that Petitioner Janney received no notice of any hearing under Rule 37(d). No hearing was had to determine the wilfulness of his non-appearance.

The motion for relief under Rule 30(b) was not noticed for hearing, but was ruled on, October 31, 1961, during a hearing noticed for another matter in another suit (T 322).

Following the ruling on the 30(b) motion (at which time the sworn amended complaint was changed to show jurisdiction[13]), the Trial Court did not then

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[12]T 1248:5-14; T 1249:9, 10; T 1251:8, 10; T 1253:7-14; T 1255:4-6; T 1257:8-12; T 1301:24-T 1302:1; T 1303:1-3; T 1304:7-9; T 1303:13-15; T 1308:19-21; T 1382:9, 10; 1382:12-15; T 1389:5, 6; T 1398:19-21; T 1400:19, 20; T 1402:25-T 1403:1; T 1405:8-10; T 1406:7, 8; T 1407:17-18; T 1410:1, 2; T 1412:23-25; T 1414:14, 15; T 1422:16-18; T 1426:25-T 1427:2; T 1429:16-18; T 1431: 15, 16; T 1433:9-11; T 1434:24, 25; T 1441:3-5; T 1444: 2-4; T 1445:15-17; T 1447:19-21; T 1454:23-T 1455:1; T 1459: 15-17 and T 1463:16-18.

[13]The change was made at the suggestion of the Trial Court (T 352:12, 13). The Trial Court acknowledged that without this change "there would be no diversity of citizenship" (T 352:11). The Complaint was altered and the Court thereupon (T 355) rejected the Petitioners' grounds that the Notice of Deposition *when filed* related to a Complaint which showed want of Jurisdiction.

notice for hearing the matter of sanctions under Rule 37(d). The proceedings were given over to the question of a bench warrant.[14] It was only when Respondent's counsel informed the Court:

> "Frankly, we would rather have a default judgment," (T 491:17, 18)

that the court struck the pleadings and entered the default.

A motion under Rule 12 to dismiss the Amended Complaint for failure to show jurisdiction was filed.

No ruling was made on the Motion to Dismiss (R 530, R 1380 ff.); nor was any Motion to Amend the Amended Complaint ever filed. Respondent's counsel made no effort to correct the Amended Complaint but instead, filed their Notice of Deposition. The fact that the Complaint was defective then formed one of the bases for Petitioners' Motion under Federal Rule 30

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[14]At T 480 counsel for respondent asks for "*a warrant of arrest . . . to compel the deposition of Mr. Janney.*"

T 482, shows that Petitioners objected to "*a bench warrant* for the arrest of Mr. Janney."

At T 484 the Court declares: "That argument won't deter me from *issuing the warrant,*" and after Petitioners' counsel states that he "wouldn't recommend to Mr. Janney that he come" *for his deposition which could kill him,* the Court declares: "Well, *the warrant is going to issue.*" (T 486)

Thus, the Court, counsel for Respondent Dolman, and counsel for Petitioners were *all* referring to "a warrant of arrest . . . *to compel the deposition of Mr. Janney.*"

These quotations were all omitted from the portions appearing in the Opinion (p. 18), thereby leading to the suggestion that the statement, "Under the circumstances of this case, I wouldn't recommend to him that he come," referred to the physical examination, not to the deposition.

In point of fact, the statement referred to the deposition, that could have killed the deponent if conducted at that time (R 756).

(b). Respondent's counsel waited until the day they filed their Motion for Default and then changed the Complaint by interlineation upon the suggestion of the Judge. The next day the default was entered. This procedure departed from the requirements of Rule 15 and from the "terms" required by 28 U.S.C. 1653.

Respondent's sworn complaint showed on its face that the Trial Court lacked jurisdiction of the suit. This complaint was not changed until *after* the time noticed for the taking of the deposition.

No notice was ever given the deponent. He was never given an opportunity to appear and testify or to summon others to testify.

Far from showing the notice and hearing required by Rule 37(d), the record shows that in the space of a few hours, the sworn Amended Complaint was altered by unsworn interlineation to show diversity (T 353); the Motion for relief under Rule 30(b) was then denied (T 408, R 1402); a month-old application for default and receivership was filed (R 726, R 727), and granted the next day (T 503). No notice of this motion was given as required by Rule 37(d) and no opportunity to be heard was ever given to Petitioner Janney. His sole notice of the proceedings was the entry of his default (R 745, T 503), not the setting of a motion.

There were several bases for the advice of counsel to the deponent that he need not respond in person, rather than by counsel, at the time noticed for the taking of the deposition;

1. The complaint showed lack of jurisdiction, and the regular correction of this would require a hearing either on the pending Motion to Dismiss or upon a motion of Respondent's counsel to correct their pleading to show the required diversity as a basis for jurisdiction. The time required for following this procedure would have allowed the deponent to recover.

2. The critical illness of the deponent required that he not abuse his health by appearing for a deposition that "could have resulted in his death" (R 756).

3. The filing of a timely motion under Rule 30(b) was a lawful procedure, on which the deponent and the Petitioners were entitled to a ruling. The Trial Court had exclusive control over the calendar to set the matter. This would require a re-setting of the deposition even if the Motion were denied, allowing the deponent time to recover.

4. This procedure had previously been sanctioned by the Trial Court on other occasions by *granting* timely motions under Rule 30(b) *after* the time noticed in the deposition.[15]

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[15]R. 1377, line 20; R. 1378, line 25.

Counsel for Respondent Dolman also used the filing of a timely Motion under Rule 30(b), even though no ruling had been made thereon, as a basis for instructing said Dolman not to testify whether her funds for bringing the action came "either directly or indirectly from Fidelity-Philadelphia Trust Company of Philadelphia." (R. 342, R. 343, R. 348, R. 349, R. 361A)

This gave rise to the inference that where the local rules did not provide for a party to obtain a hearing on his Motion for relief under Rule 30(b), that by filing his motion and taking all steps available to him in his effort to obtain relief under Rule 30(b), the deposition could not go forward until after a ruling was had on the Rule 30(b) motion. Any other procedure would

5. Both the Trial Court and Respondent's counsel had stated that the Dolman action would not be allowed to interfere with the preparation of the counterclaim against the Trust Company.[16] Admissions of the Trust Company of 12 years standing had been withdrawn and the mining company was obliged to develop secondary proof after the witnesses had died. The trial was imminent (R 700, R 649), and Peti-

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result in barring any effective means for relief under Rule 30(b), thereby extinguishing the right.

The Opinion assumes that a deponent faced with this problem should "get an order postponing the time of the deposition until his motion can be heard" (Opinion, p. 18). Such a motion is only available only under Rule 30(b). Therefore, this suggested procedure cannot cover the case where, as here, neither a setting for a Rule 30(b) motion was available, nor an order under Rule 30(b), granting delay until the motion could be heard.

[16]"Mr. Horton: . . . it is likely to seriously disrupt us with regard to these very serious matters if we get a notice of deposition . . .

Court: Well I will tell you—in the event anything like that happens you can inform the court; that would work both ways if counsel would be busy—also it isn't likely they can get ready to prepare for depositions.

Mr. Horton: Well, it would be easy to file a notice of deposition on Mr. Janney, for instance.

Court: We will wait and see what happens, we will meet those situations as they arise . . ." (T 280, T 281)

"Mr. Cornish (counsel for petitioners in the action against the Trust Company): . . . I think, Your Honor that the less activity that could be required of counsel in 310 and 311 (the Dolman actions), the more harmoniously and the more smoothly we will be able to work toward the preparation of action 101 (the counterclaim against Fidelity-Philadelphia Trust Company).

Mr. Kolb (counsel for Mrs. Dolman): I am glad Mr. Cornish said that because we would not be the cause of requiring any action on the part of his client." (T 281:21-T 282:2)

"Court (Addressing Mr. Horton): Whenever a motion is filed which seems to annoy you or annoy any other counsel, in view of the position counsel are in, I realize it is a lot of work and if there is some motion that seems to require it, get in touch with me and I will put it back on the slow track so it won't interfere with your problems. You don't have to worry about getting caught short." (T 107:11-17)

tioners had to rely on no interference from the Dolman case in order to mend this breach.

The failure to follow the procedure set out in Rule 37(d) prevented a showing that the Deponent had always been willing to depose;[17] that he thought himself entitled to apply for relief under Rule 30(b); that his absence was not wilful but in pursuit of what he believed to be his right and obligation to his health; and that as soon as he recovered sufficiently to depose he did so, and Respondent's counsel on that occasion examined him for a full day (November 30, 1961. R 1346 ff.).

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[17]The Court of Appeals Opinion assumes:

"So far as this record shows, he is still unwilling to depose." (p. 18)

This assumption fails to consider:

1. "Q (Mr. O'Connor): And as I understand your previous testimony, unless relief were granted to him under Rule 30(b), he would not submit himself for examination, is that correct? Is that your previous testimony?

A. (By Mr. Horton): No." (T 460, T 461)

2. The Motion to set aside the Default (R 754) was on the basis of a Doctor's affidavit that the deponent had recovered and could depose (R 755). However, the Trial Court insisted that only if the deponent had *not* recovered would he consider the Motion:

"Court: Unless you are going to contend Mr. Janney is not at this present time physically fit to participate in these court proceedings I don't think there is anything to listen to." (T 1544)

"Court: Would he be able at this time to have his deposition taken?

Mr. Horton: I believe so.

Court: The motion is denied. . . ." (T 1550:13-16)

3. Every motion for delay in a deposition (Rule 30(b)) is an implicit statement of a *willingness* to depose.

4. The only statement *from the deponent*, who was never given a hearing under Rule 37(d) was that *he was willing to depose*. (See Affidavit attached to Motion for Relief from Deposition on Oral Interrogatories Previously Noticed, filed November 10. 1960, part of Volume 25.)

Indispensable Parties Not Heard

The Brief in Opposition (p. 8) contends that the question of the corporations being indispensable parties disappears because the "corporations" have the "benefit" of the judgment entered in "their" favor.

It is precisely this contention that is rejected by the Fifth Circuit in *Young v. Powell* (179 F2d 147) quoted at p. 16 of the Petition. In addition, the corporations have a right to be heard on whether the suit, or the remedies sought, are either proper *or* a "benefit" to them.

The corporations traversed the original Complaint (R 54), and were prevented from answering to the merits on the Amended Complaint by their wrongful default, which was entered 24 hours after the Amended Complaint was changed to show diversity of citizenship (T 353). (The corporations had moved to dismiss the Amended Complaint as allowed by Rule 12 (R 630).)

The Court of Appeals has correctly set aside the default of the corporations. However, their wrongful default has prevented these corporations from having their day in Court to show:

(1) That Respondent Dolman, who swore the complaint, did not make demand upon the corporate authorities to assert her purported grievance. In fact, the record shows that she flatly REFUSED to tell the stockholders what her complaints were. (See footnote 1, above).

(2) The corporations were wrongfully denied their day in Court to require proof of the ma-

terial allegations of the complaint, both as to the existence of a valid claim which the corporation could enforce, and as to the presence in Court of any party qualified to assert the claim.

(3) They were not allowed to offer evidence against the allegations.

(4) They were not given the information sought in the Demand for Bill of Particulars (R 553);[18] nor were they allowed discovery to determine the basis of the claim.

(5) They were not allowed to show that the indispensable "co-plaintiffs" whose names were added to the Amended Complaint, had not authorized the use of their names.

(6) They were not allowed to show the prior representation of Dolman's attorneys.

(7) They were not allowed to show the extortionate threats of Dolman that preceded the litigation or the benefit that this litigation had for delaying or preventing the collection of the

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[18]The demand for Bill of Particulars sought "particulars as to each purported act of mismanagement, waste or employing corporate property for his own personal benefit" (R 559).

The Opinion appears to ignore this demand in stating (p. 21) "No motion for a more definite statement (Rule 12(e)) was made." Petitioners were entitled to particulars, pursuant to this Demand for Particulars, even if the Demand is treated as an interrogatory.

They were also entitled to this information under Rule 23(b). Rule 23(b) requires that a complaint in a derivative stockholders suit be stated "with particularity" both as to the nature of the claim, to show that the corporation could enforce it, *and* to show the failure or inability of the corporation to enforce such valid and subsisting claim, which the corporate interest *requires* be enforced. (See, for example, *Hawes v. Contra Costa*, 104 U.S. 450, 26 L. Ed. 827.)

counterclaim against Fidelity-Philadelphia Trust Company.

(8) They were not allowed the Trial by Jury which they had demanded (R 66).

(9) They were not allowed to prevent the misleading of the Trial Court by respondent's counsel.

(10) They were not allowed a hearing on whether their properties had been organized, developed and equipped under a President who was a defrauding "promoter", or whether he was a competent, efficient, honest and highly respected engineer, the availability of whose services to the corporations had induced the investment of some million dollars of indispensable investment capital. (This latter is the position taken in the counterclaim of Pioche Mines Consolidated and John Janney, filed by respondent's attorneys, R 2, R 26, R 27; and by the investors who supplied the development capital. See footnote 2 above).

(11) They were not allowed to show that no investment was ever made on the basis that Pioche Mines Consolidated owned the Ely Valley Mine (e.g. Lee Affidavit, Vol. 24); but on the other hand, hundreds of thousands of dollars were invested on the basis that Pioche Mines Consolidated did *not* own the Ely Valley Mine (e.g. $600,000 in debentures of Pioche Mines Consolidated and "$500,000 or more" in Ely Valley Mines Inc. and Pioche Mines Consolidated, Inc. (footnote 2 above).)

The corporations have a right to be heard on whether such results are for their "benefit." Yet their default, correctly held wrongful, deprived them of their day in Court.

REASONS FOR GRANTING THE WRIT

Consequences of the Default

Despite the lack of a hearing under Rule 37(d), Petitioner Janney has had a million dollar default judgment entered against him, and in addition, he has had counterclaims against his former attorneys and Dolman stricken. Striking these counterclaims bars his recovery of a judgment for hundreds of thousands of dollars and for tens of thousands of shares of his stock.

For their part, the corporations, pursuant to their wrongful default, have suffered hundreds of thousands of dollars of damage at the hands of the receiver (e.g., R 1204 ff; R 1214, 15; R 1216 ff; R 1220, 21) and have been prevented by the action brought by their former attorneys from prosecuting the case against the Trust Company.

Damages arising from the delay in collection of a $10,000,000 counterclaim (R 24) amount to hundreds of thousands of dollars a year.

Conflicts of This Case With Other Decisions

The instant $1,000,000 default judgment and restraining order is novel in the following respects:

1. Efficiency in the operation of a mine *increases* the measure of damage. Inefficiency would

have decreased it, by decreasing the profits that are here used as the basis for damage. No profiteering is shown. *All* of the "profits" were put back into the mine, month by month, thereby increasing the next month's profit.

2. Damages based on a claimed fraud (Opinion, pp. 21-23) are not set forth with particularity in the pleading as required by Rule 9(b) FRCP. No particularity was required in this case. Not even the Demand for Bill of Particulars[18] produced the basis for the claim. The Court, at the close of plaintiff's case, was himself ignorant of the claimed basis for damages (T 1899, line 12). The judgment is rationalized (Opinion, pp. 22, 23) on the basis of suppositions that no attempt was made either to plead or to prove; which suppositions are false to the personal knowledge of one who is supposed to have asserted the claim, but did not; and would not assert it because he knew it to be false. (Lee Affidavit page 3, Vol. 24 of Transcript). Yet the testimony of this "co-plaintiff" is precluded by the defualt.

3. The sanctions taken against a party placed in default are extended to exclude his participation on the question of damages. Only testimony showing damage in some amount, when there is no damage, is sought from him. The defaulted defendant was faced with answering a "when did you stop beating your wife" question. If he could not show how much he had damaged the corpora-

tion, which in fact he had nurtured, served without pay and championed through 20 years of litigation, then there was nothing on which his testimony was sought.

4. A property that was developed by the investment of hundreds of thousands of dollars of new money to produce a profit is *then* declared "converted," and damages are awarded because the operating income is applied to the development and further equipment of the mines and not paid over to another corporation that has supplied none of the funds needed for the development. Yet no party in interest to transaction, had opportunity to be heard.

5. An extraordinary remedy (a restraining order) is applied by default without allowing any of the three parties defendent, who were each affected thereby, to be heard; even though the default of two of these three parties is ordered set aside as wrongful (Opinion, pp. 20, 24).

Even had Petitioners been heard, the decision below would conflict with *Erie R. v. Tomkins* (304 U.S. 64, 82 L.Ed. 188, 58 S.Ct. 817, 114 ALR 1487) and with applicable state (and Federal) laws.

1. War Production Board contracts contributed a substantial portion of the "Net Profit from Operations" that form the basis of the $1,000,000 judgment.

2. Exploration contracts that made up $71,900.13 of the $1,000,000 judgment (T 2998).

All of these contracts, and the Federal Statutes relating thereto, *required* that the Ely Valley funds be put exactly where they were put, back into the mine. These contracts do *not* allow the paying over of profits from the operations of the mine, even to the investors who owned the mine, let alone to Pioche Mines Consolidated, Inc. which had no interest in the mine. Yet no defendant had been heard on this.

3. The purported claim arising out of the alleged "conversion" of the mine *by a trustee*,[19] who was never made a party to the suit, is barred by the applicable Nevada Statute of Limitations.[20]

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[19]The conveyance by the Trustee in compliance with the powers of his trust (T 2996) is "the conversion relied on" (Opinion, p. 23).

The Ely Valley Trust Agreement states:

"said loan or loans may, at the option of the lender, be represented or converted into shares of Treasury stock in a corporation, which is proposed later to be formed for the operation of the above named mining claims, and in such case the said stock shall be in that amount which shall be the proportion to the total amount of issued and outstanding stock (including loans in payment of said stock) which the fractional interest (had the election to take stock not been exercised), bears to the whole property.

"It is further agreed that *said Trustee is authorized and empowered to form a corporation* when in his judgment it may become necessary or advisable so to do in carrying into effect the purposes of this trust, *and he shall convey the properties held hereunder to the said corporation* . . ." (Exhibit A attached to Plaintiff's Exhibit 19, reproduced in Volume 23 of the Transcript of Record, pp. T 2995, T 2996; emphasis added.)

[20]Section 11.808 of the Nevada Revised Statutes sets forth the statute of limitations for mining properties:

"No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained *unless it appear that the plaintiff* or those through or from whom he claims *were seized or possessed of such mining claim*, or were the owners thereof according to the laws and

4. Had the Ely Valley Mine been "converted" on the date claimed, 1949, the Nevada Statute of Adverse Possession would bar any claim to the property *or* to the profits arising from the operation thereof.[21]

Plaintiff's Exhibit 22 showed that the occupation by Ely Valley Mines, Inc. of the Ely Valley Mine was made pursuant to a written instrument, duly recorded, that was a conveyance of the premises in question. Therefore, even if this conveyance were a "conversion" as assumed by the Court of Appeals, the continued possession of the mine by Ely Valley Mines, Inc. from the date of the conveyance down to the time of the filing

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customs of the District embracing the same, *within two years before the commencement of such action.*"

Section 11.070 of the Nevada Revised Statutes provides:

"*No cause of action* or defense to an action, *founded upon title to real property, or to rents or to services out of the same, shall be effectual, unless it appear that the person prosecuting the action* or making the defense, or those under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, *was seized or possessed of the premises in question within five years before the committing of the act in respect of which said action is prosecuted* or defense made." (Nevada Revised Statutes, 11.070; emphasis added.)

Pioche Mines Consolidated was not "seized or possessed" of the Ely Valley Mine at any time.

[21] Section 11.110 of the Nevada Revised Statutes provides:

"*Whenever it shall appear that the occupant,* or those under whom he claims, *entered into the possession of premises, under claim of title* exclusive of any other right, *founding such claim upon a written instrument as being a conveyance of the premises in question,* or upon the decree or judgment of a competent court, *and that there has been a continued occupation and possession of the premises* included in such instrument, decree, or judgment, or of some part of such premises, *under such claim, for five years, that premises so included shall be deemed to have been held adversely, . . .*" (Nevada Revised Statutes, Sec. 11.110; emphasis added.)

of the suit, would bar any claim made upon an ownership that had been "converted" in 1949.

5. The Opinion (p. 32, par. 4) orders the counterclaims of the corporations reinstated and their defaults reversed. This is empty gesture because the counterclaims assert a failure to comply with Rule 23(b), and the judgment in the Rule 23(b) action is affirmed with finality *against* the corporations who were parties defendant, but not heard.

Setting aside their defualt should allow the corporations to plead to the Amended Complaint, because the corporations' default was entered before the time to answer this complaint expired. Therefore, the judgment also should be set aside. Pleading to a complaint that has gone to judgment is an anachronism.

CONCLUSION

The decision below leaves the owners of the Ely Valley Mine to assume the risks and supply the capital in their attempts to bring the property into production, and take the loss if the venture fails. But if it succeeds, the investors are held to owe the profits to another party that supplied none of the investment in either land or capital. This result conflicts with innumerable cases (e.g. *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 593, 23 L.Ed. 328, 331, 2) and with common sense, and deprives investors of the right to the enjoyment of their property without due process.

Such a claimed basis for the judgment prevents corporate financing by declaring that investors' profits belong to someone else, and only the risks, the labors and the losses accrue to the investors. The repercussions of such a basis for derivative stockholders' actions on corporate activity from one end of the country to the other are difficult to predict.

A recorded chain of title going back forty years is held to actually reflect an interest in the property in a completely different corporation. *That* corporation, formed in 1928 with a completely different set of properties,[22] issued debentures that it is now held should also have encumbered this other mining property. All without either the corporation that is the present owner or the corporation that is the claimed former owner, being heard thereon.

Because of the serious questions of both substantive and procedural law involved in these proceedings, Petitioners respectfully petition this Honorable Court to review the decisions below.

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Of Counsel.

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[22]T 3939. See also first Meeting of Incorporators and Directors, in the front of Plaintiff's Exhibit 15.